TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 870. 1154

THE ILLINOIS CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF CHICAGO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED AUGUST 19, 1890.

(15,966.)

(16,956.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 371.

THE ILLINOIS CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF CHICAGO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

INDEX.

	Original.	Print.
Writ of error	*a*	1
Clerk's certificate that copy of writ of error is lodged in his office	*c*	2
Citation and service	*d*	2
Clerk's certificate that copy of citation is lodged in his office	*f*	2
Clerk's certificate and return to writ of error	*g*	3
Caption	1	3
Transcript from superior court of Cook county	2	4
Caption	2	4
Bill of complaint	3	4
Exhibit A—Deed from Christian B. Dodson *et ux.* to the Illinois Central R. R. Co., April 10, 1852	39	25
B—Deed from Isaac H. Burch *et ux.* to the Illinois Central R. R. Co., July 16, 1852	42	27
C—Deed from Mason Brayman *et ux.* to the Illinois Central R. R. Co., July 14, 1852	45	29
D—Diagram of 26th Street yard	54	33
E—Map of Illinois Central R. R.	55	33

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 18, 1898.

	Original.	Print.
Answer to bill	56	34
Cross-bill	71	42
Demurrer to cross-bill	77	45
Decree	79	46
Allowance of appeal	79	46
Bond on appeal	80	47
Clerk's certificate	82	47
Assignment of errors	83	48
Order taking cause under advisement	84	48
Final decree	85	49
Opinion	86	50
Order allowing writ of error	98	59
Bond on writ of error	100	60
Assignment of errors	102	61

a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable chief justice and associate justices of the supreme court of the State of Illinois Greeting:

Because in the record and proceedings, as also in the rendition of the judgment or decree which is in the said supreme court of said State, before you or some of you, being the highest court of law or equity of said State in which a decision could be had in the said suit between the Illinois Central Railroad Company and the City of Chicago, wherein it appears there was drawn in question the validity of a statute of or an authority exercised under the said State on the ground of their being repugnant to the Constitution of the United States, and that the decision was in favor of their validity, and wherein it further appears there was drawn in question a title, right, privilege, or immunity specially set up and claimed by the said Illinois Central Railroad Company under the Constitution of the United States, and that the decision of the said supreme court of Illinois was against the title, right, privilege, or immunity so specially set up and claimed, a manifest error hath happened, to the great damage of the said Illinois Central Railroad Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty (30) days from the twenty-fifth day of July, A. D. 1898, that, the record and proceedings aforesaid
b being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 26th day of July, in the year of our Lord one thousand eight hundred and ninety-eight.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

S. W. BURNHAM,
Clerk of the Circuit Court of the United States for the Northern District of Illinois.

Filed Jul- 26, 1898.

S. W. BURNHAM, *Clerk.*

c In the Supreme Court of Illinois.

ILLINOIS CENTRAL RAILROAD COMPANY *vs.* CITY OF CHICAGO. } Appeal from Superior Court of Cook County.

I, Christopher Mamer, clerk of said supreme court, do hereby certify that on the twenty-seventh day of July, in the year of our Lord one thousand eight hundred and ninety-eight, a copy of the foregoing writ of error for the defendants in error was lodged in my office, at Springfield, Illinois.

Witness my hand and the seal of said court this 29th day of July, A. D. 1898.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

CHRISTOPHER MAMER,
Clerk of Supreme Court.

[Five two-cent internal-revenue stamps, canceled July 29, 1898.]

d UNITED STATES OF AMERICA, *ss:*

To the City of Chicago, a municipality in Cook county, Illinois, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of Illinois, wherein The Illinois Central Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the decree rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph N. Carter, chief justice of the supreme court of Illinois, this 25th day of July, in the year of our Lord one thousand eight hundred and ninety-eight.

JOSEPH N. CARTER,
Chief Justice, Supreme Court of Illinois.

July 26th, 1898.

I hereby accept service of the above for the City of Chicago.

R. A. WALLER,
Acting Mayor.

e [Endorsed:] Supreme Court of the United States. —— —— *vs.* —— ——. Citation.

f In the Supreme Court of Illinois.

ILLINOIS CENTRAL RAILROAD COMPANY *vs.* CITY OF CHICAGO. } Appeal from Superior Court of Cook County.

I, Christopher Mamer, clerk of said supreme court, do hereby certify that on the twenty-seventh day of July, in the year of our Lord

one thousand eight hundred and ninety-eight, a copy of the foregoing citation and acceptance of service was lodged in my office, at Springfield, Illinois.

Witness my hand and the seal of said court this 29th day of July, A. D. 1898.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

CHRISTOPHER MAMER,
Clerk of Supreme Court.

[Five two-cent internal-revenue stamps, canceled July 29, 1898.]

g In the Supreme Court of Illinois.

ILLINOIS CENTRAL RAILROAD COMPANY *vs.* CITY OF CHICAGO. } Appeal from Superior Court of Cook County.

I, Christopher Mamer, clerk of the supreme court of Illinois, elected for the northern grand division, and keeper of the records and files thereof, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from one (1) to one hundred and one (101), inclusive, contain a true and complete transcript and copy of the record and proceedings had in said court, in the case which is above entitled, and of the whole thereof, including the opinion of the court, as the same remain of record and on file in my said office.

Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.

In testimony whereof I have hereunto set my hand and caused the seal of said supreme court of Illinois to be hereunto affixed, at Springfield, this twenty-ninth day of July, in the year of our Lord one thousand eight hundred and ninety-eight.

CHRISTOPHER MAMER,
Clerk of Supreme Court.

[Five two-cent internal-revenue stamps, canceled July 29, 1898.]

1 At a supreme court, begun and held at Springfield, on Tuesday, the first day of February, in the year of our Lord one thousand eight hundred and ninety-eight, within and for the State of Illinois.

Present: Jesse J. Phillips, chief justice.
Alfred M. Craig, justice.
Jacob W. Wilkin, justice.
James H. Cartwright, justice.
Benjamin D. Magruder, justice.
Joseph N. Carter, justice.
Carroll C. Boggs, justice.
Edward C. Akin, attorney general.
Edward A. Baxter, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered, that heretofore, to wit: on the eleventh day of January, A. D. 1898, there was filed in the office of the clerk of said supreme court, a duly certified transcript of the record and proceedings of the superior court of Cook county, in a certain cause entitled in this court, Illinois Central Railroad Company *vs.* City of Chicago, which said transcript of record is in the words and figures following, to wit:

2 UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss:
County of Cook, }

Pleas before the Honorable Henry V. Freeman, one of the judges of the superior court of Cook county, in the State of Illinois, holding a branch court of said court, at a regular term of said superior court of Cook county, begun and holden at the court-house, in the city of Chicago, in said county and State, on the first Monday, being the sixth day, of December, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States of America the one hundred and twenty-second.

Present: The Honorable Henry V. Freeman, judge of the superior court of Cook county; Charles S. Deneen, State's attorney; James Pease, sheriff of Cook county.

Attest: JOHN A. LINN, *Clerk.*

3 Be it remembered that heretofore, to wit: on the ninth day of November, in the year of our Lord one thousand eight hundred and ninety-seven, there was filed in the office of the clerk of the superior court of Cook county a certain bill of complaint, which is in the words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Superior Court of said County, November Term, A. D. 1897.

THE ILLINOIS CENTRAL RAILROAD COMPANY, Complainant, }
vs.
THE CITY OF CHICAGO, Defendant. }

To the honorable the judges of the superior court of Cook county:

The Illinois Central Railroad Company, a corporation created by and organized under the laws of the State of Illinois, the complainant herein, by its solicitor, exhibits this its bill of complaint against The City of Chicago in said county, the defendant herein, and respectfully states and shows to the court the following:

1. That as early as 1808 Albert Gallatin, then Secretary of the Treasury of the United States, advocated as a public necessity and as a great public benefit the establishment of means of communication

between the different parts of the United States by national aid. That in 1819 Mr. Calhoun, the then Secretary of War, urged such an establishment of communication on the grounds of military necessity; and as far back as 1836 the Illinois Central chemes
4 was proposed. In January, 1848, it was deemed a matter of national concern that there should be a trunk railroad connecting the Great Lakes on the northern boundary of the United States with the lower Mississippi and the gulf of Mexico on the southern boundary thereof. The canal connecting the lakes with the rivers flowing south had already been fostered and encouraged by the Federal Government, and as a part of this plan of the Government based on the public necessities, and for the public benefit, the Honorable Stephen A. Douglas, on the date last above mentioned, introduced a bill into the United States Senate asking a donation of public land and right of way to aid the States of Illinois, Mississippi and Alabama in building a railroad "to connect the upper and lower Mississippi with the Great Lakes at Chicago," and on May the 3d, 1848, said bill passed the Senate.

In April and May, 1850, it was again under discussion in the Senate, and a bill was passed, which was approved September 20, 1850. It was advocated by Mr. Clay as being for the sake of "the commerce and travel and intercourse between the people of this great Republic, which, the more the facilities of intercommunication are augmented, becomes the more harmonious and homogeneous in all its parts."

It was introduced, supported and passed after a full discussion, upon the express ground that it was, as Mr. Seward expressed it, "a great national enterprise—a great national thoroughfare," and had the warm support of Mr. Cass, Mr. King, Mr. Crittenden, Mr. Benton and others, as an interstate enterprise of national concern, and it was conceded on all hands that when it was constructed it would be an incalculable public benefit.

5 2. Your orator further states that, beginning about the same time, the States and people in the territory between the Great Lakes on the north, and the gulf of Mexico on the south, were moved, as by a common impulse, to take active steps to secure the building of a trunk line—as a great public benefit.

In April, 1851, a convention of the people was held in New Orleans, at which aid was promised, and each of the States was petitioned to grant liberal charters, and State aid, and to co-operate with each other and the people in said territory in securing the building of such a trunk line.

On February 22, 1852, the State of Tennessee passed an act, the preamble of which is as follows:

"Whereas, by resolutions, adopted by railroad convention, begun and held on the 6th of April, A. D. 1851, at the city of New Orleans, in the State of Louisiana, it appears to this General Assembly that the right of way and charter for a railroad to extend northward from said city of New Orleans, through a part of the States of Louisiana, Mississippi, Tennessee and Kentucky to the Ohio river, having in view to connect the same with the proposed Great North and

South Central Railroad of Illinois, are earnestly solicited from the legislatures of the various States through which it is to pass; and also, in which said resolutions the city of New Orleans did, therein through its representatives in said convention, pledge itself for a very liberal aid in the construction of said railroad, and whereas, it is deemed a matter of vital importance to this State that a direct communication by railroad to the gulf of Mexico and the great northern lakes be established; therefore be it enacted," etc.

In 1853 a charter was granted by the State of Louisiana
6 in which the purpose was declared to be "a continuous line of communication between New Orleans and the northern and western portions of the Confederacy;" and that it is "to be made on such a scale as shall serve for the main trunk 'line' from New Orleans to Jackson in the State of Mississippi, thence northward through the State of Mississippi," etc.

By an act approved March 11, 1852, the State of Mississippi declared that the construction of such trunk line through the State of Mississippi "is deemed a work of great public importance, and is in strict accordance with the true policy and interest of our State, and should be encouraged by legislative sanction."

The State of Alabama granted a charter, and aid, and the State of Kentucky also took steps to forward the construction of a trunk line connecting the lakes and the Gulf. Individuals, towns, counties and States, recognizing the public benefit as well as the public necessity of such a line of railroad—all contributed towards its establishment, many of them straining their credit to the utmost for that purpose.

3. Your orator states that the State of Illinois by an act approved January 18, 1836, entitled "An act to incorporate the Illinois Central Railroad Company," attempted to secure the building of a railroad from the junction of the Ohio and Mississippi rivers northward through the State—which among other things provided by sec. 5 thereof, as an inducement to its building and operation, "that the legislature shall not at any time so reduce the tolls as to produce less than twelve per centum upon the cost of said railroad, without the consent of said company. And no other railroad than the one hereby granted shall within fifty years from the passage of this act, be authorized to be made, leading from the Ohio river or
7 Mississippi river, commencing below the mouth of the Illinois river to any place within ten miles of the northerly termination of the railroad hereby established."

Neither the corporators named in said last-mentioned act nor the State of Illoinois, which involved her credit in attempting to build said road, were able to accomplish it, and so on March 5, 1843, another act was passed by said State, entitled: "An act to incorporate the Great Western Railway Company," which not only had the provision of the act of 1836 securing 12 per centum net income, but also provided for bonds to be issued to raise funds, and by section 10 provides that the principal and interest of such bonds shall be secured, as therein provided, and that "the whole net income of all rents and tolls derivable from the road, works, buildings, lands and

other property of the company shall be and are hereby declared to be specially held pledged and irrevocably secured to the holders of the said bonds or obligations of the company against the claim or claims of all other parties."

Said act also provided for a sinking fund.

By section 12 it was provided that "all work done at the expense of the State on the Central railroad; also all materials, lands or right of way" *was* to be turned over to said railroad company at its then value, and to be paid for at par in the depreciated bonds or indebtedness of the State.

With these increased inducements there was an utter failure to construct the road, and the charter of the Great Western Railway Company was repealed.

8 Again in 1849, by an act approved February 10th, of that year, the State made another effort to secure the great public benefit of a trunk line of railroad from its southern to its northern boundary. In this act the State revived the Great Western charter, and in addition to inducements theretofore granted, made a donation of "the right of way that the State may have obtained, together with all the work and surveying done at the expense of the State, and materials connected with said road lying between the termination of the Illinois and Michigan canal and Cairo city," and by section 4 of said act provided that all lands granted by Congress to the State of Illinois, to aid in the completion of said trunk railroad, should be used or sold for its benefit.

This effort of the State also ended in failure, and by an act approved February 17, 1851, the acts of 1849 and of 1843 and of 1836 aforesaid, were repealed. And on February 10, 1851, the act incorporating your orator was approved.

4. Your orator further states and avers that by the said act of Congress approved September 20, 1850, the right of way two hundred (200) feet in width was granted through the public lands to the State of Illinois for the construction of a railroad from the southern terminus of the Illinois and Michigan canal to a point at or near the junction of the Ohio and Mississippi rivers, with a branch of the same to Chicago on Lake Michigan, and another *via* the town of Galena in said State to a point on the Mississippi river opposite the town of Dubuque in the State of Iowa, with the right to take the necessary lands, waters and materials for the construction of the same. And in addition to said right of way two hundred (200) feet in width, said act granted to the State of Illinois, to

9 aid in making said railroad and branches, every alternate section of land, designated by even numbers, for six sections in width on each side of said road and branches.

Your orator states that it was provided by said act as follows:

"SECTION 4. And be it further enacted, That the said lands hereby granted to the said State shall be subject to the disposal of the legislature thereof, for the purposes aforesaid, and no other; and that the said railroad and branches shall be and remain a public highway, for the use of the Government of the United States, free from

toll or other charge upon the transportation of any property or troops of the United States."

Your orator further states and shows that it duly accepted, was created by, organized under, and now exists by virtue of an act of the legislature of the State of Illinois approved February 10, 1851, entitled "An act to incorporate the Illinois Central Railroad Company," hereinbefore referred to; and your orator was by its said charter authorized to survey, locate, construct, complete, alter, maintain and operate a road with one or more tracks or lines of rail from the southern terminus of the Illinois and Michigan canal to a point at or near the junction of the Ohio and Mississippi rivers, with a branch of the same to Chicago on Lake Michigan, and also a branch *via* the city of Galena to a point on the Mississippi river opposite the town of Dubuque, in the State of Iowa.

Your orator further states that under and by virtue of its said charter it constructed its line of railroad within the limits of the city of Chicago in the year 1852, and that it completed its line of railroad extending between the termini named in its charter in the State of Illinois in the year 1857, and that the total number
10 of miles of its railroad in the State of Illinois upon the completion of the same was seven hundred and six (706) miles. That at the time of the construction of its railroad in 1852 in the city of Chicago, the southern limits and boundary of said city extended only to Twenty-second street. That it constructed the line of its railroad immediately along the shore and partly over the shallow waters of Lake Michigan from Fifty-first street to Twenty-second street, the said southern boundary of said city, and thence its railroad was constructed into the city of Chicago through and upon the waters of Lake Michigan pursuant to an ordinance of the common council of said city, providing among other things for the location of said railroad as follows:

"The said road shall enter said city at or near the intersection of its southern boundary with Lake Michigan and following the shore on or near the margin of said lake northerly to the southern boundary of the open space known as Lake park, in front of canal section fifteen, and continue northerly across the open space in front of said section fifteen to such grounds as the said company may acquire between the north line of Randolph street and the Chicago river."

Your orator further states that its railroad in said city between Twenty-second street and Randolph street was constructed on piling set in the open waters of Lake Michigan east of the shore. That between Park row and Randolph street the distances in a direct east-and-west line between the shore line and the inner or west line of the piling on which the railroad of your orator was constructed through the open waters of Lake Michigan, are as follows:

11	At Park row	5 feet.
	At Harmon court	100 "
	At Eldredge court	150 "
	At Peck court	190 "
	At Hubbard court	225 "

At Harrison street	240 feet.
At Congress street	250 "
At Van Buren street	270 "
At Jackson street	288 "
At Adams street	300 "
At Monroe street	310 "
At Madison street	310 "
At Washington street	288 "
At Randolph street	288 "

And your orator avers that the depth of the waters along the line of the piling on which the tracks of your orator were laid between the points above stated was:

At Park row	2½ feet.
At Harmon court	5 "
At Eldredge court	6½ "
At Peck court	8 "
At Hubbard court	8½ "
At Harrison street	8 "
At Congress street	8½ "
At Van Buren street	9 "
At Monroe street	9½ "
At Madison street	9 "

Your orator further states and avers that during the period of the construction by your orator of its railroad in the State of Illinois as prescribed by its charter, the work of constructing the railroads provided for by the aforesaid charters granted by the States of Louisiana, Mississippi and Tennessee upon a line extending northerly from the city of New Orleans through the States of Louisiana, Mississippi and Tennessee was prosecuted and carried on in furtherance of the common purpose to construct a trunk-line
12 railroad extending from the lakes to the gulf of Mexico, and that shortly after the year 1857 said railroads were constructed. That afterwards, and in order to connect the line of railroads last mentioned with the road of your orator at its southern terminus at Cairo, Illinois, and thereby to complete a continuous trunk line from the lakes to the gulf of Mexico, a railroad connecting with and continuing the line of railroad already constructed through the States of Louisiana, Mississippi and Tennessee was, under a charter granted by the State of Kentucky, constructed through that State northerly to a junction with the railroad of your orator at Cairo. Upon the construction of said railroad through the State of Kentucky to a connection with the railroad of your orator at Cairo, the purpose and plan of the Congress of the United States and the several States to construct in the interest of commerce a trunk-line railroad, extending from the Great Lakes to the gulf of Mexico, was accomplished. Your orator states that the amount expended in constructing, equipping and maintaining the trunk line contemplated by the act of Congress and the several States hereinbefore mentioned exceeded the sum of one hundred million

dollars. Your orator further states that it now owns or controls by lease or otherwise, and is now operating under one management, the whole of the trunk line aforesaid as one continuous line from New Orleans on the lower Mississippi through the States of Louisiana, Mississippi, Tennessee, Kentucky and Illinois, into the city of Chicago; that it also owns or controls by lease or otherwise under the same management many other lateral lines of railroads in the States of Mississippi, Tennessee, Kentucky and Illinois, above named, and also in the States of Wisconsin, Iowa and Dakota,
13 which directly connect with and are tributary to the parent line of your orator; and the total number of miles now owned or controlled by your orator by lease or otherwise and under one management is more than forty-six hundred miles. That the city of Chicago is the business centre and focus of all the various lines of railroad which together constitute the system owned or controlled by your orator under one management, and the lateral lines hereinbefore referred to very greatly swell and increase the amount of commerce and traffic carried on and conducted upon the tracks and terminal facilities located within said city. Your orator herewith files as Exhibit "E" a map showing the railroad lines owned or controlled and operated by your orator under one management.

Your orator avers and states the truth to be that the amount of the business carried on and conducted by your orator over its terminal tracks and terminal facilities within the present limits of the city of Chicago is so great and so constantly increasing that the whole of its right of way and lands contiguous thereto within said limits are used to their utmost capacity as yards, shops, depot grounds, side tracks, switching tracks, storage tracks, delivery tracks, team tracks and other structures, all of which are absolutely necessary as terminal facilities to enable your orator to carry on and conduct its business as a common carrier of freight and passengers, and all its right of way and lands contiguous thereto in said city are covered by tracks laid as close together as is consistent with the safe movement and operation of locomotives and cars thereon, and also such other structures and appliances as are necessary to the operation of its railroad, each and all of which tracks, structures and appliances are necessary and essential to enable your orator to carry on and conduct its business in said city.

14 Your orator avers that the business of your orator greatly increases from year to year, and that it has up to the present time so continued to increase that its present terminal facilities in the city of Chicago are not fully adequate for the purposes and uses prescribed and intended by its charter, the said act of Congress, and the laws of the State.

Your orator further states that in addition to the business carried on and conducted by it, all the passenger and freight business conducted and carried on in the city of Chicago by the Michigan Central Railway Company and the Cleveland, Cincinnati, Chicago and St. Louis Railroad Company is carried on and conducted over the tracks, yards, depots and structures comprising the terminal facilities of your orator in said city.

Your orator further states and avers that in the year 1870 its suburban trains ran south from Randolph street only to Oakwood, or 67th street, in the village of Hyde Park, and that only five suburban trains ran between Randolph street, the northern terminus of its suburban service, and 67th street, daily in each direction during the week, and that no suburban trains were run on Sunday. That prior to September, 1880, the suburban trains of your orator ran south from Randolph street only to Grand Crossing, and that only thirteen suburban trains ran between the points named daily in each direction. That in September, 1880, until some years after, only twenty (20) suburban trains ran south from Randolph street daily to Grand Crossing, and that five of these trains ran as far south as Kensington. That in the year 1890 the suburban trains operated on the tracks of your orator within the limits of the city of Chicago ran from Randolph street past Grand Crossing as far south as Harvey, a distance of about twenty (20) miles, and to South Chicago, fifty-six of such suburban trains running daily in each direction. That at the present time, 1897, the suburban service of your orator extends from Randolph street to Homewood on the main line; to South Chicago, on its branch line; and to Blue Island, on another branch line, one hundred and six (106) trains running daily in each direction, making a total of two hundred and twelve (212) suburban trains running into and out of said Randolph Street station daily.

Your orator further states and avers that the number of tons of freight carried by it during the years ending December 31, 1870, and December 31, 1880; and during the years ending June 30, 1890, and June 30, 1897, are as follows:

Years.	Freight tonnage.	Increase.
1870	1,623,944	
1880	2,703,582	1,079,638
1890	6,359,729	3,656,147
1897	9,948,267	3,588,638

And your orator further states and avers that the number of passengers carried by it during the years ending December 31, 1870, and December 31, 1880, and during the years ending June 30, 1890, and June 30, 1897, are as follows:

Years.	Passengers handled.	Increase.
1870	1,376,585	
1880	2,753,544	1,376,959
1890	8,207,213	5,453,669
1897	12,827,205	4,619,992

Your orator further states that by the provisions of its said charter it was required to pay to the State of Illinois annually, seven (7) per centum of its gross earnings; and your orator further states and charges the truth to be, that the annual increase of its gross earnings and the seven per centum thereof paid annually to the State of Illinois, is as follows:

Year.		Gross receipts of Illinois Central proper.	Rate of tax.	Amount contributed to State treasury.
Up to October 31	1855	595,633.86	5%	29,751.59
Year ended " "	1856	1,552,633.32	5%	77,631.66
" "	1857	2,170,372.69	5% & 7%	145,645.84
" "	1858	1,885,793.34	7%	132,005.53
" "	1859	1,887,206.77	"	132,104.46
" "	1860	2,536,531.67	"	177,557.22
" "	1861	2,532,254.47	"	177,257.81
" "	1862	3,031,065.79	"	212,174.60
" "	1863	4,291,351.09	"	300,394.58
" "	1864	5,793,057.71	"	405,514.04
" "	1865	7,092,711.94	"	496,489.84
" "	1866	6,101,082.18	"	427,075.75
" "	1867	6,342,967.56	"	444,007.74
" "	1868	6,119,964.66	"	428,397.48
" "	1869	6,641,904.47	"	464,933.31
" "	1870	6,636,921.66	"	464,584.52
" "	1871	6,621,913.05	"	463,512.91
" "	1872	6,326,522.11	"	442,856.54
" "	1873	6,122,485.76	"	428,574.00
" "	1874	5,633,806.56	"	394,366.46
" "	1875	5,368,086.02	"	375,766.02
" "	1876	5,085,794.14	"	356,005.58
" "	1877	4,519,313.42	"	316,351.94
" "	1878	4,577,595.80	"	320,431.71
" "	1879	4,649,676.96	"	325,477.38
" "	1880	5,262,123.73	"	368,348.66
" "	1881	5,494,035.95	"	384,582.52
" "	1882	5,657,658.77	"	396,036.11
" "	1883	5,553,474.13	"	388,743.19
" "	1884	5,095,423.28	"	356,679.62
" "	1885	5,254,127.50	"	367,788.92
" "	1886	5,410,207.15	"	378,714.50
" "	1887	5,919,636.72	"	414,374.57
" "	1888	6,070,798.53	"	424,955.89
" "	1889	6,574,923.58	"	460,244.65
" "	1890	6,946,873.25	"	486,281.13
" "	1891	7,685,795.37	"	538,005.67
" "	1892	8,421,228.80	"	589,486.02
" "	1893	10,758,103.43	"	753,067.24
" "	1894	7,913,021.23	"	553,911.49
" "	1895	8,804,593.01	"	616,321.50
" "	1896	8,926,519.84	"	624,856.39
" "	1897	8,937,047.08	"	625,593.30
		$238,801,938.35	.....	$16,666,859.86

17 5. Your orator further states and avers that, owing to the general growth and increased prosperity of the country at large, the great increase in the population and the various enterprises of the city of Chicago, and the consequent vast increase of commerce and traffic, that, in the year 1890, and for some years prior thereto, its terminal facilities in the city of Chicago became and were wholly inadequate to enable your orator to carry on its business. That in 1892, it begun the erection, and in 1893, completed, at a cost of more than one million dollars, its general offices, its station buildings and train sheds and station yards, located between Park row and Eighteenth street—its station yards extending from Eighteenth street north to a point north of Park row—and removed the original passenger-house and train shed theretofore existing at Randolph street, because the same was wholly insufficient for the business of your orator, and occupied ground necessary to and upon which tracks, platforms, and other structures were erected, necessary for the purpose of operating the increasing suburban service of your orator. That the machine shops and engine-house of thirteen stalls originally erected by your orator in the city of Chicago near Fourteenth street, or Weldon, were wholly inadequate to perform and carry on the business of your orator necessary to be conducted in said shops and engine-house, and in 1892, machine shops were erected by it upon a very large and expensive scale at great cost, and fully equipped with all improved modern machinery and appliances; and the shops and engine-house theretofore existing at Weldon being useless, and occupying ground required for other necessary structures, were removed, and the ground occupied by such shops was applied to the use of tracks and other struct-
18 ures that were absolutely necessary in the business of your orator.

And your orator further states that the tracks and road-bed of the St. Charles air line in the city of Chicago, which connect with your orator's railroad north of Sixteenth street, and extends westerly to the Chicago river, where it connects at the south branch of the Chicago river, with the western lines controlled and operated by your orator, and extending into the States of Wisconsin, Iowa, Minnesota, and Dakota, and is used as its only connection with its said lines from the west with the railroad line of your orator extending north and south; and your orator further avers that it is the joint owner with three other railroad companies in said city, of the St. Charles air line, and that said owners were ordered and required by an ordinance of the city of Chicago, passed by the city council thereof, on the seventeenth day of May, 1897, to begin the elevation of the St. Charles air line at a point on the existing tracks of the Illinois Central Railroad Company, near what is known as Park Row station of said railroad; from this initial point said elevated railroad and tracks of the St. Charles air line shall rise on any suitable gradient for a distance of 1,860 feet, where an elevation of not less than 29.10 feet above city *datum* shall be attained; thence shall continue at the same elevation, curving to the right for a distance of 800 feet more or less to the east line of Indiana avenue; thence

said elevated road-bed and tracks shall continue on a level grade, and in a westerly direction to a point about on the west line of Wabash avenue, where an elevation of not less than 29.10 feet above the city *datum* shall be attained; and thence by a descending gradient to a point west of the South branch of the Chicago
19 river; and your orator avers that in order to elevate said St. Charles air line as provided by said ordinance, it is necessary, and is provided in the plan adopted and required for such elevation, that it should have an ascending incline from the east, beginning at a point north of Park row on the shore of Lake Michigan, on the ground lately filled in by your orator, under a contract with said city, known as the Lake Front settlement, and thence by a rising incline, reach an actual height of sixteen (16) feet above the surface of the ground, and be carried from a point on the shore of Lake Michigan, on the east over the tracks, station yards and lands of your orator to the west line of its right of way on a bridge sixteen feet above the surface of said tracks and structures of your orator, and thence westwardly as is provided by said ordinance. And your orator avers that the incline and approach required by the ordinance of said city to carry the elevated tracks of the St. Charles air line over the tracks, station yards and lands of your orator will occupy a large part of your orator's grounds, including the ground formerly occupied by the engine-house constructed in the year 1856, between 14th and 15th streets.

That the freight yard of your orator at Randolph street was so cramped, and so incapable of handling the business conducted by your orator upon its tracks and terminal facilities, in the city of Chicago, that cars of freight, oftentimes amounting to fifteen hundred (1,500) or more in number, were compelled to be held out, and could not be delivered to the consignees for days at a time, on account of the congested condition and small capacity of said freight yards; the ground on which the tracks and structures were laid and erected being of insufficient dimensions to allow additional
20 tracks and structures, or to permit the enlargement of said yard at Randolph street, your orator, for the express purpose of meeting the absolute demands and requirements for its business, acquired land in addition to its two hundred feet right-of-way land, for the sole purpose of establishing and locating a yard upon a large and extensive scale, for the necessary purpose of extending and increasing the facilities of your orator for receiving, storing and distributing cars loaded with freight arriving in Chicago over the lines of your orator; and that more than fifty-six tracks were in 1892 laid and completed in said yard, comprising a total of twenty-one (21) miles of track, for the purpose of properly conducting the increased business of your orator, and additional tracks have since been laid, as the increasing business of your orator required.

Your orator further states that, prior to the year 1895, its car shops, its repair shops, paint shops and other structures appurtenant thereto, which were located at 27th street, and acquired by your orator in the year 1852, were wholly inadequate to meet the business demands and necessities of your orator required to be carried

on and conducted in said shops, and the buildings occupied grounds needed and required by your orator for other necessary structures and terminal facilities. That in the year 1895 your orator, at large expense, constructed new car shops and repair shops, and fully equipped the same with all necessary modern improvements and appliances, and the buildings occupying the grounds at 27th street were taken down and removed in the year 1896, and tracks and other necessary structures were placed on said grounds.

Your orator further states and avers the truth to be, that
21 many engines daily use its tracks, grounds and terminal facilities, lying between 18th street and the Chicago river; that many passenger engines daily arrive at and depart from its passenger station, train sheds and station yards between Park row and 18th street; that many freight engines daily arrive at and depart from its freight yards at Randolph street; that two hundred and twelve (212) suburban engines daily arrive at and depart from its suburban passenger station at Randolph street; that many switch-engines daily are engaged between 18th street and the Randolph Street yards in distributing and making up passenger trains arriving at and departing from its passenger station at Park row and Twelfth street, and in distributing and making up freight trains on the side tracks and yard tracks at Randolph street, and on the yard and side-tracks between 18th street and the Chicago river.

Your orator states and avers the truth to be that one hundred and thirty-five (135) engines, consisting of through passenger engines arriving at and departing from the station and train shed and station yards between Park row and 18th street; suburban engines arriving at and departing from Randolph street; freight engines arriving at and departing from Randolph Street freight yards; switching engines doing their work in switching and distributing passenger cars and freight trains as aforesaid between 18th street and Randolph Street freight yards, are required, at intervals not exceeding eight (8) hours of operation, to have their fires drawn, the water taken from the boilers, allowed to cool, the fire-boxes, the boilers and flues thoroughly inspected and examined, and, if defective, repaired; to be oiled, and all its machinery put in good order, and to have all necessary and proper repairs made, commonly
22 known as "running repairs," before again beginning work, in order that the same may be run and operated safely and efficiently.

Your orator further states and avers the truth to be that all such repairs, overhauling and preparation of engines for the purpose of enabling them safely and efficiently to perform their work are made at an engine-house, where, after an engine has been duly repaired, overhauled and fitted for work, it is coaled, watered, fired and sent upon its journey. That in connection with such engine-house, and as necessary essentials and appurtenances thereto, are constructed tracks leading into the several stalls or compartments thereof, a turn-table, a machine shop suitably equipped with machinery and appliances adequate to make "running repairs," which are such repairs as the replacing of a defective truck wheel, valves, piston-rods,

levers, or any other part of the engine or tender that can be done within a period of a few hours; a coal chute, water tank, and incline, cinder pits, depressed track, sand-house, oil-house, and other structures. And your orator avers that such engine-house and its accompanying structures, as above stated, is an absolute necessary essential and appurtenance to, and in fact an integral part of, a railroad, for the purpose of the complete operation thereof, and that it is reasonably necessary that the same should be erected, used and operated as near as practicable to the locality between 18th street and Randolph street, from which the engines of your orator arrive and depart, or at which the work of switching is daily done. And your orator further avers that in order to meet its increased business necessities and requirements, it is absolutely necessary that it should build, construct, and use an engine-house three hundred and sixteen (316) feet in diameter, and containing forty (40)
23 stalls, together with a machine shop, turn-table, coal chute, and water tank, etc.; and that such engine-house of such dimensions and capacity, with the appurtenances thereto, is barely sufficient to meet the present necessities of your orator for taking care of the one hundred and thirty-five (135) engines which are daily required to be cared for after each eight hours of work before they can be safely used and operated.

Your orator avers that in 1870 a small engine-house containing fifteen (15) stalls, and to which ten stalls were afterwards added, was erected on the shore of Lake Michigan at a point nearly opposite 14th street; that said engine-house prior to the year 1897 was wholly inadequate to the needs and business of your orator in taking care of and repairing its engines; that it was not of sufficient size or capacity to permit the engines of your orator to be cared for, very many of them being required to stand exposed and unhoused in the winter time while the work of overhauling and repairing them, and fitting them for safe operation was conducted; and the ground upon which it was erected did not admit of its being enlarged without a serious interference with, and obstruction of, tracks and other necessary structures and appurtenances used and employed by your orator in the operation of its road. Not only was it unfit to meet the demands of the business of your orator in the repair, overhauling and fitting of its engines for work, but was originally constructed of such material that it become so decayed, its foundations so impaired, and its walls so weak, its roof so imperfect and dilapidated, that it was in fact so dangerous to the persons engaged at work about the same in repairing and refitting the engines of your orator, that in the early part of the year 1897, it was taken
24 down and the material thereof used to strengthen the breakwater along the line of your orator's railroad in the city of Chicago; your orator at the same time caused plans to be made for the construction of a proper, suitable engine-house of three hundred and sixteen (316) feet in diameter, to contain forty (40) stalls, together with the essential and necessary appurtenances above described.

6. Your orator states and avers the truth to be that it has no

engine-house whatever in the city of Chicago, at which it is practicable for its said engines to be overhauled and fitted for operation; and your orator further states and charges the truth to be that it has no land whatever unoccupied by other necessary tracks and structures which is either sufficient in dimension or suitably located, upon which to locate and construct an engine-house of the necessary dimensions and capacity, with the necessary appurtenances thereto, as hereinbefore described, required and necessary for the business of your orator; and that in order to build said engine-house and the appurtenances, it is necessary to construct the same upon land submerged by the shallow waters of Lake Michigan, at a point between 51st street and 16th street.

7. Your orator further states and charges that by its said charter, approved February 10, 1851, it is provided by section 3 thereof, as follows:

"The said corporation shall have right of way upon, and may appropriate to its sole use and control, for the purposes contemplated herein, land not exceeding two hundred feet in width through its entire length; may enter upon and take possession of, and use all and singular any lands, streams and materials of every kind, for the location of depots and stopping stages, for the purpose of
25 constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turnouts, engine-houses, shops and other buildings necessary for the construction, completing, altering, maintaining, preserving and complete operation of said road. All such lands, waters, materials and privileges belonging to the State, are hereby granted to said corporation for said purposes; but when owned or belonging to any person, company or corporation, and cannot be obtained by voluntary grant or release, the same may be taken and paid for, if any damages are awarded, in the manner provided in 'An act to provide for a general system of railroad incorporation,' approved November 5, 1849, and the final decision or award shall vest in the corporation hereby created, all the rights, franchises and immunities, in said act contemplated and provided," etc.

That by section 27 of its said charter, it is provided, as follows:

"This act shall be deemed a public act, and shall be favorably construed for all purposes therein expressed, and declared in all courts and places whatsoever, and shall be in force from and after its passage."

And your orator avers that under the terms and provisions of its charter, its corporate existence is in perpetuity.

Your orator further states and charges, as it is advised by counsel, that the grant by the State of Illinois to your orator, contained in said charter, of the right to enter upon and take possession of and use all such lands, waters, materials and privileges, belonging to the State, for the location of depots and stopping stages for the purpose of constructing bridges, dams, embankments, excavations,
26 station grounds, spoil banks, engine-houses, shops and other buildings necessary for the construction, completing, altering, maintaining, preserving and complete operation of its said road;

provided, that the use of such lands and waters does not interfere with navigation on Lake Michigan, having reference to the manner in which commerce is conducted thereon, was and is a contract between the State of Illinois and your orator, is irrevocable, and confers upon your orator a vested and continuing right to use the shallow waters and submerged lands of Lake Michigan for such purposes, when such use is reasonably necessary for the business of your orator, provided the same does not interfere with the navigation of the lake, having reference to the manner in which commerce is conducted thereon. And your orator avers that any law of the State of Illinois, or any judgment, decree or decision of any court or tribunal thereof, which denies or in any way impairs the right of your orator under the provisions of its said charter to use the submerged land of Lake Michigan for the purpose of constructing and using engine-houses, shops and other buildings thereon, when the same is reasonably necessary, and does not interfere with navigation, having reference to the manner in which commerce is conducted on the lake, for the construction, completing, altering, maintaining, preserving and complete operation of the road of your orator for the purpose of accomplishing the purposes designed and provided by its said charter, impairs the obligation of the contract created by said charter between the State and your orator, and is in violation of section ten, article one, of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts.

27 Your orator avers and states the truth to be that in the year 1852, at the time of the construction of its road south of 22d street, and within the limits of the city of Chicago, it purchased certain lands now lying between the lines of 25th street and 27th street produced eastwardly, bordering on the shore of Lake Michigan, and now within the present limits of the city of Chicago, and paid therefor a sum of money which at the time of said purchase was then considered to be a full equivalent for the land purchased; and the title to said lands in fee-simple, at the time of the purchase thereof, was, by deeds duly executed, acknowledged and recorded, conveyed to your orator; and upon the execution of said deeds your orator became vested with the fee-simple title and ownership of said lands; that by the description and designation of the lands in the deeds conveying the same to your orator in fee-simple, the shore of Lake Michigan was designated and described as being the east boundary thereof, and under said deeds your orator, as owner of said lands in fee-simple, became and was vested with all the riparian rights and privileges incident to the ownership in fee of the shore land. Your orator herewith files copies of the said deeds conveying said lands to your orator, as Exhibits "A," "B" and "C," and makes the same a part of this, its bill of complaint, and asks that they may be considered as parts thereof as fully as if set forth at large.

Your orator states that the land mentioned and described in paragraph 4 of the deed of conveyance by Mason Brayman and wife to your orator, filed as Exhibit "C," extends from the southern

boundary of the land described in paragraph 3 of said deed, to a point south of 27th street, shown on the map hereinafter referred to as Exhibit "D;" and your orator avers that ever since
28 the title in fee-simple in and to said lands was conveyed to it by deeds of conveyance hereinbefore referred to, it has been and now is the owner in fee-simple of said lands, and ever has been in the sole, exclusive and adverse possession thereof since the date of said conveyances until the present time.

For the purpose, among others, of designating and delineating the location of said land more particularly, your orator herewith files a map as Exhibit "D," as a part of this its bill of complaint, and asks that the same be considered as such, showing among other things the delineation and designation of said lands thereon.

Your orator states that the northern boundary of said land is about one hundred and sixty (160) feet south of the south line of 25th street produced eastwardly, as shown on said map, and the south line of said land is south of 27th street, as shown on the map.

Your orator avers that whatever land lies east of the right of way of your orator and north of the north boundary line of the land conveyed to it by C. B. Dobson and wife, described in Exhibit "A," and shown on the map filed as Exhibit "D," and extending north and east of said right of way as far as 22d street, is claimed by one George E. Walker.

Your orator states and avers the truth to be that in the year 1882, it constructed a breakwater or bulkhead in the shallow waters of Lake Michigan, the same being located and constructed in front of the aforesaid land north of 27th street and south of 25th street, owned by your orator in fee-simple, the east and west line of said breakwater on the north extending from a point on the shore continuous with the northern boundary line of the land con-
29 veyed to your orator by C. B. Dobson and wife by deed, a copy of which has herein been referred to as Exhibit "A," and extending to a point 200 feet easterly from the present shore line, running thence southerly a distance of 781 feet, and thence westerly to the present shore line a distance of 325 feet, as is more particularly shown by the line lettered *a*, *b*, *c*, *d*, on the map herewith filed as Exhibit "D;" that the breakwater built by your orator in 1882, was constructed on two rows of piling driven into the bed of Lake Michigan, and the space between the rows of piling was filled in with stone in order to strengthen and enable the breakwater to withstand the force of Lake Michigan during periods of storm, and your orator states and avers that all the shore land embraced within the lines of said breakwater now is and ever since the year 1852 has been owned in fee-simple by your orator, and your orator is and ever since the year 1852, has been entitled to all the riparian rights and privileges incident to the ownership in fee-simple of said shore land.

Your orator avers and states the truth to be that the superficial area of the submerged land lying within the lines of said breakwater and the shore line of Lake Michigan is only 195,200 square

feet, or 4.48 acres; and your orator states and avers the truth to be that the superficial area of the ground necessary for the engine-house, machine shop, coal chute, and the other necessary structures appurtenant thereto, as hereinbefore described, is 168,426.9 square feet, or 3.86 acres.

Your orator states that in the year 1894, a part of the breakwater hereinbefore referred to as having been constructed by it in the year 1882, was destroyed by a storm on Lake Michigan.
30 That it being necessary, to enable your orator to carry on and conduct its business, that an engine-house of sufficient capacity to meet the necessary requirements and demands of your orator in conducting its business, and to accomplish the objects for which it was chartered, should be constructed and erected at a reasonably suitable, convenient and proper location, and it being necessary that such engine-house should be located and constructed upon the lands submerged by the shallow waters of Lake Michigan lying in front of lands on the shore of Lake Michigan owned in fee-simple by your orator, that as hereinbefore stated, it caused plans to be made for an engine-house three hundred and sixteen (316) feet in diameter and containing forty (40) stalls or compartments, and under the power, authority and right given and vested in it under and by its charter, and in the exercise of its rights as riparian owner, your orator elected and determined to locate and construct said engine-house on land submerged by the shallow waters of Lake Michigan, lying within the limits of said breakwater; and to rebuild and repair said breakwater and to fill in the submerged lands lying within the limits of said breakwater for the purpose of constructing thereon said engine-house, and the necessary appurtenances thereto, as hereinbefore described and set forth. And your orator again avers and states the truth to be that it is necessary and essential to enable your orator to fully carry on and conduct its business as a common carrier of goods and passengers, and the complete operation of its road, that the lands submerged by the shallow waters of Lake Michigan, and lying within the lines of said breakwater between 25th street and 27th street, hereinbefore described, should be filled in and reclaimed by your orator for the purpose of
31 constructing said engine-house and appurtenances thereon, and when said land is so filled in and reclaimed, to construct, use and operate thereon said engine-house and appurtenances hereinbefore specified.

Your orator further states and avers the truth to be that said breakwater does not in any way whatsoever interfere with or impede the navigation of Lake Michigan, and that it is not located within the limits, and is not a part of the harbor of the city of Chicago; that the most exterior line of said breakwater runs northerly and southerly at an average distance of 250 feet from the present shore line, and the depth of water along said line does not exceed ten feet, and shallows as it approaches the shore, and the construction of said breakwater and filling in the lands within its limits does not substantially impair the public interest in the remaining lands and waters of Lake Michigan. Your orator avers that,

before beginning the work of rebuilding and repairing the breakwater which had been constructed in 1882, and in order not to violate any rule or regulation of the United States prohibiting interference with navigation, it applied to the honorable the Secretary of War of the United States, and asked permission to repair and rebuild the same along the exterior straight lines, as shown by the map herewith filed and referred to as Exhibit "D," on which the breakwater had been constructed in 1882; and your orator states that the Secretary of War consented and gave permission to your orator to repair and rebuild said breakwater, as will more fully appear by reference to a letter of the Secretary of War, bearing date August 14, 1897, in the words and figures following:

32 "*Repair of Piers, 25th & 27th Sts., Chicago.*

File No., 9725.

WAR DEPARTMENT, WASHINGTON, *August* 14, 1897.

SIR: I have the honor to acknowledge the receipt of your letter of 6th instant, requesting permission to repair certain piers, belonging to your company, in the vicinity of 25th and 27th streets, Chicago, Illinois.

In reply I beg to inform you that the local engineer officer, to whom your communication was referred, having reported that the proposed work will in no way affect the general navigation of Lake Michigan or of Chicago harbor, the War Department will interpose no objection thereto.

Very respectfully, G. L. MEIKLEJOHN,
Acting Secretary of War.

J. T. Harahan, Esq., 2nd vice-president Illinois Central Railroad Company, Chicago, Illinois."

Your orator further states and charges that, while denying any authority or right whatsoever on the part of the city of Chicago, either to permit or prevent the construction of said breakwater, yet, in order to avoid any controversy with, or interference by the police of said city in the construction of said breakwater, it obtained from its commissioner of public works permission to construct said breakwater. And thereupon your orator placed upon the ground large quantities of material for repairing and rebuilding said breakwater, the filling in of the submerged lands embraced within the lines thereof, and for the construction of the said engine-house and
33 appurtenances thereto on the submerged lands to be filled in and reclaimed; and repaired and rebuilt the said breakwater by driving two rows of piling along the line *a*, *b*, *c*, *d*, shown on said map heretofore filed as Exhibit "D," and filled in a large part of the space between the exterior and interior line of piling with stone for the purpose of enabling the piling and breakwater to withstand the force of Lake Michigan; but your orator states that it was prevented by the police force of the city of Chicago, acting

under the orders and direction of the mayor, from completing the work of filling with stone the space between the two rows of piling. And your orator, after having placed on the ground large quantities of material for the construction of the engine-house and the appurtenances thereto, as aforesaid, entered into negotiations with different persons to furnish wholesale, suitable and proper material to fill in and reclaim the submerged lands embraced within the lines of the breakwater, for the purpose of constructing thereon said engine-house and appurtenances thereto.

And your orator avers and states the truth to be, that in filling in and reclaiming the submerged lands under the shallow waters of Lake Michigan for the purpose of constructing said engine-house and appurtenances thereto, it does not intend, and in fact will not use any earth or material whatsoever in so filling in and reclaiming said submerged land, except such as are wholesome, free from noxious matter, and will not in any way whatsoever pollute the waters of Lake Michigan, or in any way injure or affect the health of the citizens of Chicago in the neighborhood thereof, or the sanitary condition of the place filled in, and that the police and sanitary rules and regulations of the city of Chicago will not in any manner whatsoever be violated by your orator in doing the
34 work of filling in and reclaiming said submerged land; and your orator, by its agents, servants and employés, has often attempted and endeavored in the exercise of its rights, given and granted by its charter, and also in the exercise of its riparian rights incident to its ownership in fee of the shore land, to fill in and reclaim said submerged land lying within the lines of said breakwater, for the purpose of constructing said engine-house and appurtenances.

8. Your orator states and avers the truth to be, that the city of Chicago has revoked the permit given your orator to construct said breakwater, and arbitrarily and without right of authority, by the employment of the police force of the city, acting under the orders and directions of its mayor, interferes with and forcibly prevents your orator from filling in and reclaiming the submerged land within the lines of said breakwater, and opposite the shore of the land owned in fee-simple by your orator; that the police of said city have been ordered and directed by its mayor, forcibly to prevent by arrest or otherwise, the agents, servants and employés of your orator from filling in and reclaiming said submerged land by placing thereon, for the purpose of filling in and reclaiming said land, any material whatsoever, however pure and free from noxious and unwholesome matter; and your orator avers the truth to be that its agents, servants and employés have continuously heretofore been, and now are, forcibly prevented from so filling in and reclaiming said submerged land, by the police of said city, acting under the orders and directions of the mayor of said city, and your orator will not be allowed to exercise, and is forcibly prevented by the mayor and police of the city of Chicago from exercising the
35 authority, power and right conferred upon it by its charter, and from exercising the riparian rights vested in your orator

as the owner in fee of the shore land in front of which it intends to fill in and reclaim the submerged lands in the shallow waters of Lake Michigan, to use, when reasonably necessary for the construction of said engine-house, the said land submerged by the shallow waters of Lake Michigan, lying within the lines of said breakwater between 25th street and 27th street, and to erect on the land so reclaimed the aforesaid engine-house and appurtenances thereto, necessary for the use and business of your orator. Your orator avers that by the construction of said breakwater, and the filling in and reclaiming of said submerged land, neither any public nor private right of the city of Chicago is violated or infringed; that the city has no proprietory interest in lands in the vicinity of the submerged land which your orator intends to fill in and reclaim; and as your orator has heretofore stated, no ordinance, law or regulation which the city of Chicago has heretofore made or has any lawful right to make, will in any way whatsoever be violated by the construction of said breakwater, and the filling in and reclaiming of said land. Your orator avers that the city of Chicago arbitrarily, wantonly and without any lawful authority, in violation of the fifth and fourteenth amendments of the Constitution of the United States, deprives your orator of its property without due process of law under color of a pretended ordinance of said city, and by means of its police forcibly hinders and prevents, and denies to your orator the exercise of rights vested in your orator under and by virtue of its charter and rights vested in it by reason of its ownership in fee of the shore land, to fill in the submerged lands aforesaid, and your orator states and charges the truth to be
36 that the said city of Chicago will hereafter, by its police force, acting under the orders and directions of its mayor, continue forcibly to prevent the exercise of such rights on the part of your orator unless restrained by the injunction of this honorable court, and thereby inflict great wrong and irreparable injury upon your orator, which your orator is powerless to resist or prevent.

9. The premises considered, and your orator being remediless at and by the strict rules of common law, and is relievable only in a court of equity, where matters of this nature are properly cognizable and relievable.

To the end, therefore, that the said defendant, The City of Chicago, may full, true, perfect and direct answer make to each and every of the matters and things herein set forth and contained as fully and truly as if the same were herein again repeated, and it, the said defendant, thereunto specially interrogated, not answering, however, under oath, answer under oath being hereby expressly waived.

And to the end further that the said defendant, The City of Chicago, its officers, attorneys, agents and servants, and more especially its mayor and superintendent of police, may be enjoined, prohibited and restrained from further preventing or in anywise whatsoever interfering with your orator, its agents, servants and employés in completing said breakwater lying between 25th street and 27th street in said city, as hereinbefore stated, by placing stone in the

space between the two rows of piles, which so remains unfilled, and that the defendant, The City of Chicago, its officers, attorneys, agents and servants, and more especially its mayor and superintendent of police, may be enjoined, prohibited and restrained from preventing or in anywise whatsoever interfering with your orator in
37 filling in with wholesome and suitable material and driving piling in and reclaiming and using the lands submerged by the shallow waters of Lake Michigan, lying within the lines of said breakwater south of 25th street and north of 27th street, in the city of Chicago, for the purpose of constructing thereon an engine-house and the appurtenances thereto, as the same have heretofore been set forth and described, until the further order of this court.

And that on the final hearing of this cause the said injunction may be made perpetual, and that your orator may have such other and further relief as in equity and good conscience it may be entitled, and as to your honors may seem meet and proper.

May it please your honors to direct that the State's writ of injunction do issue, enjoining, prohibiting and restraining The City of Chicago, the defendant, its officers, attorneys, agents and servants, and more especially its mayor and superintendent of police, and each of them, as your orator has heretofore prayed, until the further order of this honorable court.

And also, may it please your honors to direct that the State's writ of subpœna, do issue, commanding the City of Chicago on a day certain and under a certarn penalty therein specified, to be and appear before this honorable court, and then and there full, true, perfect and direct answer make to all and singular the matters herein contained, and further to stand to, perform and abide such order, direction and decree therein as to your honors shall seem meet.

And as in duty bound your orator will ever pray, etc.

C. V. GWIN,
Solicitor for Complainant.

JAMES FENTRESS,
Of Counsel.

ILLINOIS CENTRAL RAILROAD CO.,
By J. C. WELLING,
Vice-President.

[SEAL.]

38 STATE OF ILLINOIS, }
County of Cook. }

Before me, the undersigned, David W. Ross, a notary public in and for said county and State, this day personally appeared J. T. Harahan, to me personally known to be the second vice-president of The Illinois Central Railroad Company, the complainant in the above-entitled cause, who being by me first duly sworn, upon his oath doth say that he is the second vice-president of The Illinois Central Railroad Company, the complainant; that he has read the foregoing and annexed bill of complaint by the said Illinois Central Railroad Company against the city of Chicago, and knows the contents thereof,

and that all the matters and things therein set forth and contained are true.

J. T. HARAHAN.

Subscribed and sworn to before me this the eighth day of November, A. D. 1897.

[SEAL.] DAVID W. ROSS,
Notary Public.

I recommend that injunction issue as prayed for in the foregoing bill upon bond in the sum of one thousand dollars ($1,000), with James Fentress as surety, being filed.

LUCIUS W. WINCHESTER,
Master in Chancery, Superior Court.

Master's fees, $5.00. Paid by complainant 9th November, 1897.

39 EXHIBIT "A."

Copy, Oct. 18, 1897; P. L. deed No. 27.

This indenture, made the tenth day of April, in the year one thousand eight hundred and fifty-two, between Christian B. Dodson and Harriet N., his wife, of the county of Du Page and State of Illinois, and the Illinois Central Railroad Company of the second part.

Witnesseth, that the said party of the first part, for and in consideration of the sum of four thousand and six hundred dollars lawful money of the United States of America, to them in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have remised, released and quitclaimed, and by these presents do remise, release and quitclaim, unto the said party of the second part, and to their successors, heirs and assigns forever, all the following lot or parcel of land, to wit: Commencing at a point five chains and fourteen links north of the center of section 27, township thirty-nine north, fourteen east, of the third principal meridian, running thence north three chains and fifty-six links; thence east eleven chains and eighty-two links to Lake Michigan; thence southerly along the shore of said lake to a point five chains and fourteen links north of the south line of said fractional northeast quarter of said section 27; thence west to the place of beginning, in the county of Cook and State of Illinois, being the same land sold by Stevens and Carpenter to said C. B. Dodson.

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the above-described premises, and every part and parcel thereof, with the appurtenances. To have and to hold all and singular the above mentioned and described premises, together

40

with the appurtenances, unto the said party of the second part, their successors and assigns, forever.

And the said Christian B. Dodson, for himself, heirs, executors and administrators, doth covenant, promise and agree, to and with the said party of the second part, their successors and assigns, that he has not made, done, committed, executed, or suffered any act or acts, thing or things whatsoever, whereby, or by means whereof, the above mentioned and described premises, or any part or parcel thereof, now are, or at any time hereafter shall or may be impeached, charged or incumbered, in any manner or way whatsoever.

In witness whereof, the said party of the first part, have hereunto set their hands and seals the day and year first above written.

C. B. DODSON. [SEAL.]
H. N. DODSON. [SEAL.]

Sealed and delivered in the presence of—
C. H. DODSON.
M. M. WHITE.

Acknowledged 30th July, 1852.
Re-recorded Oct. 21, 1876, Book 571, page 274.

41 Copy, Oct. 30, 1897.

STATE OF ILLINOIS, } ss:
Du Page County, }

I, Henry F. Vallette, notary public, in and for said county, in the State aforesaid, do hereby certify, that Christian B. Dodson and Harriet N. Dodson, his wife, personally known to me to be the same persons whose names are subscribed to the annexed deed, appeared before me this day in person, and acknowledged that they signed, sealed and delivered the said instrument of writing as their free and voluntary act, for the uses and purposes therein set forth.

And the said Harriet N. Dodson, wife of the said Christian B. Dodson, having been by me examined separate and apart and out of the hearing of her husband, and the contents and meaning of the said instrument of writing having been by me fully made known and explained to her, acknowledged that she had freely and voluntarily executed the same, and relinquished her dower to the lands and tenements therein mentioned, without compulsion of her said husband, and that she does not wish to retract the same.

Given under my hand and seal notarial this 30th day of July, A. D. 1852.

[SEAL.] (Signed) HENRY F. VALLETTE,
Notary Public.

36167.

STATE OF ILLINOIS, } ss:
County of Cook, }

Filed for record 16 August, 1852, and recorded in Book 51 of Deeds, page 351.

(Signed) L. D. HOARD, *Recorder.*

42 No. 107,863.

STATE OF ILLINOIS, } ss:
Cook County, }

Re-recorded Oct. 21, A. D. 1876, at 2 o'clock p. m., Book 571 of Records, page 274.

(Signed) JAS. STEWART, *Recorder.*

EXHIBIT "B."

Copy, Oct. 13, 1897; P. L. deed No. 28.

This indenture, made this sixteenth day of July, in the year of our Lord one thousand eight hundred and fifty-two, between Isaac H. Burch and Mary W., his wife, of the city of Chicago, county of Cook and State of Illinois, of the first part, and the Illinois Central Railroad Company, of the second part.

Witnesseth, that the said party of the first part, for and in consideration of six thousand and two hundred dollars in hand paid by the *second* party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part forever released and discharged therefrom, have granted, bargained, sold, remised, released, aliened, confirmed and quitclaimed, unto the said party of the second part, and to their heirs and assigns forever, all the following-described lot, piece or parcel of land, to wit: All that part of the northeast fractional quarter of section (27) twenty-seven, in township thirty-nine (39) north, range fourteen east of the third principal meridian, in said county and State and bounded as follows: Commencing at a point on the west line of said fractional quarter section, one chain and eight and one-half links north of its southwest corner, running thence east on a line parallel to the south line
43 of said fractional quarter, fifteen chains and eighty-four links to Lake Michigan, thence northwesterly along the shore of the lake, to a point five chains and fourteen links from the south line of said quarter, thence west on a line parallel to the south line of said fractional quarter, thirteen chains and seventy-seven links, to the west line of said fractional quarter, thence south four (4) chains and five and a half links to the place of beginning, containing six acres, more or less, being the same property conveyed by William A. Baldwin to said Isaac H. Burch, which is designed to be conveyed by this deed be the same more or less than described herein.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining; and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, claim or demand whatsoever of the said party of the first part, either in law or equity, of, in and to the above-bargained premises, with the hereditaments and appurtenances: To have and to hold the said premises above bargained and described, with the appurtenances, unto the said party of the second part, his heirs and assigns for-

ever. The party of the first part designs by this deed to convey to the party of the second part all right he may have acquired by the conveyance of William A. Baldwin to him, and no more.

In witness whereof, the said party of the first part hereunto set their hands and seals, the day and year first above written.

ISAAC H. BURCH. [SEAL.]
MARY W. BURCH. [SEAL.]

Signed, sealed and delivered in presence of—
A. HUNTINGTON.

Acknowledged 14th Oct., 1852.
Re-recorded Oct. 21, 1876.

44 Copy, Oct. 30, 1897.

STATE OF ILLINOIS, } ss:
Cook County, City of Chicago, }

I, Alonzo Huntington, a notary public within and for said city, in the county, in the State aforesaid, do hereby certify, that Isaac H. Burch & Mary W., his wife, personally known to me to be the same persons whose names are subscribed to the foregoing deed, appeared before me, this day, in person, and acknowledged that they signed, sealed and delivered the said instrument of writing, as their free and voluntary act, for the uses and purposes therein set forth. And the said Mary W., wife of the said Isaac H. Burch, having been by me examined, separate and apart, and out of the hearing of her husband, and the contents and meaning of the said instrument of writing having been by me made known and fully explained to her, acknowledged that she had freely and voluntarily executed the same, and relinquished her dower to the lands and tenements therein mentioned, without compulsion of her said husband, and that she does not wish to retract the same.

Given under my hand and seal notarial this 14th day of October, A. D. 1852.

(Signed) ALONZO HUNTINGTON,
[SEAL.] *Notary Public.*

No. 41641.

STATE OF ILLINOIS, } ss:
County of Cook, }

Filed for record April 23d, 1853, and recorded in Book 61 of Deeds, page 398.

(Signed) L. D. HOARD, *Cl'k.*

45 STATE OF ILLINOIS, } ss:
County of Cook, }

Re-recorded Oct. 21, A. D. 1876, at 2 o'clock p. m., Book 639 of Records, page 448.

(Signed) JAS. STEWART, *Recorder.*

EXHIBIT "C."

This indenture, made the 14th day of July, A. D. 1852, between Mason Brayman and Mary, his wife, of the county of Sangamon and State of Illinois, of the first part, and the Illinois Central Railroad Company, of the second part,

Witnesseth, that the said party of the first part, for and in consideration of the sum of twenty-one thousand nine hundred eighty-eight $\frac{44}{100}$ dollars ($21,988.44) lawful money of the United States of America, to them in hand paid, by the said party of the second part, at and before the ensealing and delivery of the- presents, the receipt whereof is hereby acknowledged, have remised, released and quitclaimed, and by these presents do remise, release and quitclaim unto the said party of the second part, and to their successors, assigns and legal representatives forever all the following-described pieces, parcels and lots of land, situated, lying and being in the county of Cook and State of Illinois, and bounded and described severally and respectively as follows:

First. Outlot number one (1) in the subdivision of the west half of section number twenty-seven (27) in township number thirty-nine (39) north of range fourteen (14) east of the third principal meridian, according to a plat of said subdivision of said section made by the trustees of the Illinois and Michigan canal, and recorded in the office of the recorder of Cook county, being the same land conveyed by C. V. Dyer and wife to said Brayman, by deed dated March 13th, 1852, for the sum of two thousand dollars ($2,000).

Second. So much of the northeast quarter of said section twenty-seven (27) as lies east of the west line of land designated for the route of the Illinois Central railroad, said west line being fifty feet west of the centre or main track of said road, and parallel thereto, as the same is surveyed, established and recorded by said company, bounded on the north by lands lately sold by W. A. Baldwin to J. H. Burch, and on the south by land lately sold by C. R. Albee to M. Brayman, and on the east by Lake Michigan, being the same land conveyed by Conrad Isport and wife by deed, dated March 22, for one hundred and fifty dollars ($150).

Third. So much of the same section twenty-seven (27) as is bounded on the west by a line fifty feet west of the centre or main track or line of the Illinois Central railroad, as the same has been surveyed, established, platted and recorded by said company, in the office of the recorder of Cook county, on the north by land sold by C. Espart to M. Brayman, on the east by Lake Michigan, and on the south by land sold by W. F. Myrick to M. Brayman, being the same land conveyed on the 26th of March, 1852, by C. R. Albee and wife to M. Brayman for two hundred and fifty dollars ($250).

Fourth. So much of the same section twenty-seven (27) as is bounded on the west, by a line fifty feet west of the centre or main track or line of the Illinois Central railroad, as the same has been

surveyed, established, platted, and recorded by said com-
47 panies in the office of the recorder of Cook county, on the north by land sold by C. R. Albee and wife to Mr. Brayman, on the east by Lake Michigan, on the south by land sold by W. F. Myrick and wife to M. Brayman, being the same land sold by Willard F. Myrick and wife to M. Brayman, by deed of March 20th, 1853, for the sum of one hundred and twenty-five dollars ($125).

Fifth. So much of the same section twenty-seven, as lies east of a line drawn parallel with the centre track or line of the Illinois Central railroad, at the distance of fifty feet westerly therefrom and parallel thereto, as said centre line has been surveyed, established and recorded, bounded on the north by land conveyed by W. F. Myrick and wife to M. Brayman, and on the south by the south boundary of said section twenty-seven, (excepting two lots or parcels of land included in the above description belonging, the one to M. Brayman and E. McIlroy the other to James Carney and Daniel McIlroy), being the same lands conveyed by W. F. Myrick and wife to said M. Brayman, by two deeds, dated respectively March 20, 1852, and April 9, 1852, for the aggregate sum of five thousand three hundred and forty dollars ($5,340).

Sixth. The undivided half of the following parcel or lot of land, being part of the south fractional quarter of the same section twenty-seven (27) bounded as follows: Commencing on the west line of said fractional quarter section seven hundred and sixty seven feet and three inches ($767\frac{3}{12}$) south from the centre of said section, running thence south on the centre line of said section one hundred and fifty feet and thirty-hundredths (150.30). Thence east
parallel with the north line of said section to Lake Michigan,
48 thence northerly along the lake to a point seven hundred and sixty-seven feet and three inches ($767\frac{3}{12}$) south of the north line of said quarter section, thence west parallel with the north line of said section to the place of beginning, containing four acres, more or less, being the same property conveyed by Robert S. Willson and wife to M. Brayman, on the 23d of March A. D. 1852, for the sum of twelve hundred dollars ($1,200).

Seventh. So much of the northeast fractional quarter of section thirty-four (34) in township thirty-nine (39) north of range fourteen, east of the third principal meridian, in Cook county, as lies east of a line drawn parallel with and fifty feet west of the main track or centre line of the Eastern branch of the Illinois Central railroad, as the same is surveyed, established and platted and of record in the office of the recorder of Cook county, bounded on the north by the north line of said section and on the south by lands of Stephen A. Douglas, being the same lands conveyed by Henry Graves and wife and Lonn Graves and wife to M. Brayman on the 25th of March, A. D. one thousand eight hundred and fifty-two, for the sum of twenty-six hundred dollars ($2,600).

Eighth. So much of the fractional sections thirty-four and thirty-five, in township thirty-nine north, range fourteen east of the third principal meridian in Cook county as lies east of a line drawn parallel to and fifty feet west from the centre track or main line of the Illi-

nois Central railroad as surveyed, established and located, and recorded in the office of the recorder of said county of Cook, bounded by lands of Charles Cleaver on the south and by lands of S. A. Douglass on the north, saving and excepting herefrom one
49 acre of land heretofore, by said Ellis sold to Thomas Cleaver (or the part of an acre), being the same lands conveyed by said Samuel Ellis and wife to M. Brayman by deed, dated March the 22d, 1852, for the sum of nineteen hundred and two dollars ($1,902).

Ninth. So much of the southeast fractional quarter of section number two (2), in township number thirty-eight north, range fourteen east of the third principal meridian, as lies east of a line drawn parallel to and one hundred feet west from the centre track or main line of the Illinois Central railroad, as surveyed, located and recorded, bounded on the north by lands sold by Isa-c Cook & H. T. Dicky to M. Brayman, and on the south by lands of M. Brayman purchased of Charles B. Phillips, being the same land sold by Benjamin Tibbitts and wife to M. Brayman on the 20th day of March, A. D. 1852, for the sum of eighteen hundred and forty-eight dollars ($1,848).

Tenth. Entire northeast fractional quarter of section two (2), in township thirty-eight north of range fourteen (14) east of the third principal meridian in Cook county, being the same land sold by Isa-c Cook & Hugh T. Dickey to M. Brayman by their several deeds, dated March 15 and 23, 1852, for the sum of five hundred dollars ($500).

Eleventh. The entire fractional east half of the northeast quarter of section eleven (11) town thirty-eight, range fourteen east of the third principal meridian in Cook county, containing sixty $\frac{46}{100}$ acres, being the same land conveyed by Charles B. Phillips and wife and the trustees of the Illinois & Michigan canal by their several
50 deeds to M. Brayman for the sum of two thousand and three dollars and forty-four cents ($2,003 44).

Twelfth. So much of the east half of the northeast quarter of section fourteen (14) in township thirty-eight (38) north, range fourteen east of the third principal meridian in said county of Cook as is contained within the width of one hundred feet on each side of the centre track or main line of the Illinois Central railroad, as surveyed, laid out, established and recorded.

Being part of land conveyed by Benjamin Tibbitts and wife to M. Brayman, by their deed, dated March 20th, 1852, the consideration being included in clause number nine hereof.

Thirteenth. So much of the east half of the northeast quarter of section twenty-three (23), township thirty-eight (38) north of range fourteen (14), east of the third principal meridian, as lies west of a line drawn parallel to and one hundred feet east from the centre track or main line of the Illinois Central railroad, as surveyed, located and established and duly recorded in said county of Cook containing eight $\frac{37}{100}$ acres more or less, being the same land sold by Cyrus Bentley, administrator of Robert A. Forsyth, deceased, to M. Bray-

man as appears by his deed of April 2, 1852, for the sum of ($50) fifty dollars.

Fourteenth. The northeast quarter of section ten (10) in township thirty-seven (37), north of range fourteen, east of the third principal meridian in Cook county, containing one hundred and sixty acres, being the same sold by Grant Goodrich and Samuel F. Smith to M. Brayman by their two several deeds, for the sum of sixteen hundred dollars ($1,600).

51 *Fifteenth.* So much of the southeast quarter of the southwest quarter of section thirty-one (31) township thirty-six (36), north of range fourteen, east of the third principal meridian, in Cook county, as lies west of a line drawn parallel to and east from (at the distance of one hundred feet) the centre or main track of the Illinois Central railroad, as surveyed, established and recorded in said county of Cook being the same land conveyed by Rily Hart to M. Brayman by deed dated April 5, 1852, for the sum of twenty dollars ($20).

Sixteenth. The west half of the northwest quarter of section thirty-five (35) town thirty-five (35), north of range 13, east of the third principal meridian, in Cook county, being eighty acres, and the same conveyed by Jacob Richl and others, to M. Brayman by their deed dated April 13, 1852, for the sum of eighteen hundred dollars ($1,800).

Seventeenth. So much of the southeast quarter of section twenty-eight, and of the northeast quarter of section twenty-three, both in township thirty-seven (37) north of range fourteen east of the third principal meridian in Cook county as lies east of a line drawn parallel to and one hundred feet west of the centre track or line of the Illinois Central railroad as surveyed, located, established and recorded, being thirty acres, and the same property conveyed by Abby Berriam and others to M. Brayman by their deed dated June 3, 1852, for the sum of six hundred dollars ($600).

Together with all and singular, the tenements, hereditaments and appurtenances, thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also all the estate, right, title, in-

52 terest, property, possession, claim and demand whatsoever as well in law as in equity of the said party of the first part of, in and to the above-described premises, and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the above-described premises and every part and parcel thereof, together with the appurtenances, unto the said party of the second part, their successors, assigns, and other proper representatives, forever.

And the said Mason Brayman, for himself, his heirs, executors and administrators, doth covenant, promise and agree, to and with the said party of the second part, their successors, assigns or other proper representatives, that he has not made, done or committed, executed or suffered any act or acts, thing or things whatsoever, whereby or by means whereof the above mentioned and described premises, or any part or parcel thereof, now are, or at any time

hereafter, shall or may be impeached, charged or encumbered, in any manner or way whatsoever.

This conveyance, however, being subject to the reservations and conditions contained in the conveyances of the premises hereinbefore set forth to the said party of the first part.

In witness whereof the said party of the first part have hereunto set their hands and seals the day and year first above written.

M. BRAYMAN. [SEAL.]
MARY BRAYMAN. [SEAL.]

Sealed and delivered in presence of—
J. B. F. RUSSELL.

53 STATE OF ILLINOIS, } ss:
Cook Co., City of Chicago, }

On the nineteenth day of July, in the year of our Lord one thousand eight hundred and fifty-two, before the subscribed J. B. F. Russell, notary public, duly commissioned and sworn, and residing in the city of Chicago, personally appeared M. Brayman and Mary, his wife, to me known to be the real persons described in and who executed the annexed deed.

And the said M. Brayman and Mary, his wife, acknowledged that they executed the same freely and voluntarily, for the uses and purposes therein expressed.

And the said Mary, wife of the said M. Brayman, being by me examined separate and apart from her said husband, and the contents of said deed having been by me fully explained to her, acknowledged that she executed the same, and relinquished her dower to the premises therein mentioned voluntarily and freely without the compulsion of her said husband.

In testimony whereof I have hereunto set my hand and affixed my official seal the day and year above written.

[NOTARIAL SEAL.] J. B. F. RUSSELL,
Notary Public.

36168.

STATE OF ILLINOIS, } ss:
County of Cook, }

Filed for record 16th August, 1852, and recorded in Book No. 50 of Deeds, page 432, &c.

L. D. HOARD, *Recorder.*

No. 107,865.

Refiled for record 21st Oct., A. D. 1876, at 2 o'cl- p. m.
JAMES STEWART, *Recorder.*

56 STATE OF ILLINOIS, } ss:
County of Cook, }

I, Robert M. Simon, recorder of deeds and keeper of the records in and for said county, in the State aforesaid, do hereby certify that the annexed is a true and correct copy of the record of a certain in-

strument filed in my office the twenty-first day of October, A. D. 1876, as document No. 107,865, and recorded in Book 690 of Records, at page 328.

In testimony whereof I have hereunto set my hand and affixed my official seal, at Chicago, this thirteenth day of January, A. D. 1897.

[SEAL.] ROBERT M. SIMON, *Recorder.*

(Here follow diagrams marked pp. 54 & 55.)

And afterwards, to wit, on the twelfth day of November, A. D. 1897, there was filed in the office of the clerk of said court a certain answer, which is in the words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Superior Court of said County, November Term, A. D. 1897.

THE ILLINOIS CENTRAL RAILROAD COMPANY, Complainant, }
vs.
THE CITY OF CHICAGO, Defendant. }

The answer of The City of Chicago, defendant, to the bill of complaint of The Illinois Central Railroad Company, complainant.

This defendant, now and at all times hereafter, saving to
57 itself all manner of benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said bill contained, for answer thereunto, or so much and such parts thereof as this defendant is advised it is or may be material or necessary for it to make answer unto, answering, says, etc.:

That as to all and singular the matters and things alleged, contained and stated in the said bill of complaint in paragraphs from one to six, inclusive, thereof, this defendant is not informed and has no knowledge save by the said bill of complaint; it therefore denies the same, and if it be material, leaves the said complainant to establish the same by the proofs thereof.

This defendant admits that the said complainant was incorporated by its charter, approved February 10, 1851, and that it is provided by section 3 thereof substantially as set forth in paragraph 7 of said bill of complaint. But the said charter contains also a declaration that the said charter should not be so construed as to authorize the said complainant to interrupt the navigation of the streams, and also said charter contains further the prohibition upon the said complainant against making a location of its road in any city without the consent of its common council. And this defendant avers the fact to be that in said charter there is no provision that the said complainant may have the right to enter upon and reclaim any part or portion of the bed of Lake Michigan unless by construction the said lake may be considered as coming under and included in

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

the term "streams," and that if the said charter may be so construed, then the prohibition is the same as to the bed and waters of said lake, and this defendant pleads and sets forth the said charter
58 and refers to the same as published in the private laws of 1851, the same as if it were fully set forth and repeated herein, and especially insists that by reason of the said declaration, as well as by the said prohibition contained therein, the said complainant is not entitled to any relief by reason of anything stated or contained in the said bill of complaint.

And this defendant further says that it is true that by section 27 of its charter it is prescribed that:

"This act shall be deemed a public act, and shall be favorably construed for all purposes therein expressed and declared, in all courts and places whatsoever, and shall be in force from and after its passage."

But this defendant expressly denies that under the terms and provisions of its charter its corporate existence is in perpetuity, and that the grant by the State of Illinois to said complainant, contained in said charter, of the right to enter upon and take possession of and use all such lands, waters, materials and privileges belonging to the State, for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, engine-houses, shops and other buildings necessary for the construction, completing, altering, maintaining, preserving and complete operation of its said road; provided, that the use of such lands and waters does not interfere with navigation on Lake Michigan, having reference to the manner in which commerce is conducted thereon, was and is a contract between the State of Illinois, is irrevocable, and confers upon said complainant a vested and continuing right to use the shallow waters and submerged lands of Lake Michigan for such purposes, when such use is reasonably necessary for the business of said complainant,
59 provided the same does not interfere with the navigation of the lake, having reference to the manner in which commerce is conducted thereon. And this defendant also denies that any law of the State of Illinois, or any judgment, decree or decision of any court or tribunal thereof, which denies or in any way impairs the right of said complainant under the provisions of its said charter to use the submerged land of Lake Michigan for the purpose of constructing and using engine-houses, shops and other buildings thereon, when the same is reasonably necessary, and does not interfere with navigation, having reference to the manner in which the commerce is conducted on the lake, for the construction, completing, altering, maintaining, preserving and complete operation of the road of said complainant for the purpose of accomplishing the purposes designed and provided by its charter, impairs the obligation of the contract created by said charter between the State and said complainant, and is a violation of section 10 of article 1 of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts.

And this defendant further says that as to whether the said com-

plainant, at the time specified in said bill of complaint, or at any other time, purchased certain lands now lying between the lines of 25th street and 27th street produced eastwardly, bordering on the shore of Lake Michigan, and now within the present limits of the city of Chicago, and paid therefor a sum of money which at the time of the purchase was then considered to be a full equivalent for the land purchased, and the title to said lands in fee-simple, at the time of purchase thereof, was, by deeds duly executed, acknowledged and recorded, conveyed to said complainant; and upon the execution of said deeds said complainant became vested with the
60 fee-simple, title and ownership of said lands; that by the description and designation of the lands in the deeds conveying the same to said complainant in fee-simple, the shore of Lake Michigan was designated and described as being the east boundary thereof, and under said deeds said complainant, as owner of said lands in fee-simple, became and was vested with all the riparian rights and privileges incident to the ownership in fee of the shore land, this defendant is not informed otherwise than by the allegations of said bill and Exhibits "A," "B," and "C," respectively, therefore it denies the same.

That as to whether the complainant ever constructed a breakwater in the shallow waters of Lake Michigan at the time or in the manner set forth in the said bill of complaint this defendant has no knowledge save by the said bill, and it therefore denies the same, leaving the said complainant to its proofs thereof.

And this defendant further admits that the said complainant has through its officers and agents determined that it is necessary that the said complainant should intrude upon the bed of Lake Michigan and seize, lay hold of and possess certain submerged lands which now constitute the bed of Lake Michigan and reclaim the same from the waters thereof, so as to appropriate the same for the purpose of constructing and erecting thereon what said complainant deems to be an engine-house of sufficient capacity to meet the necessary requirements and demands of said complainant in conducting its said business, but this defendant avers that the said complainant has no right, title, claim or interest in or to any part or portion of said submerged lands, but is a trespasser and intruder thereon; that all submerged lands constitute the bed of Lake
61 Michigan, and are covered by and with the navigable waters of said lake; that the same are within the corporate limits of the city of Chicago and constitute a part of the harbor of said city, and are necessary for the commerce as the same is now conducted on and by means of said lake; and this defendant further says that it disclaims all intention or design of interfering with the repair or reconstruction of the breakwater at the point named in said bill of complaint, but what it does object to is the filling up of the lake between said breakwater and the shore line west of said breakwater for a purpose not in aid of navigation, but in obstruction thereof, and that, too, without any permission from the city of Chicago, from the State of Illinois, or from the Government of the United States.

And this defendant further says that it is a municipal corporation, organized and subsisting under and by virtue of that certain act of the General Assembly of the State of Illinois, entitled "An act to provide for the incorporation of cities and villages (approved April 10, 1872, in force July 1, 1872)," and the several acts amendatory thereof and supplementary thereto, and that, among other things, it is empowered to regulate and control the use of public landing places for docks and levees; to control and regulate the anchorage, moorage and landing of all water crafts and their cargoes; to make regulations in regard to the use of harbors, and to appoint harbor masters and define their duties, and that in the exercise of such power this defendant has, through its police power, prevented the said complainant hitherto from filling up the said lake and intruding upon the navigable waters thereof, and that all the acts and doings complained of as done and performed by this defendant, its officers, agents and employés, have been done strictly
62 in the line of its duty in that behalf for the purpose of protecting its own rights and the rights of the public generally, in the premises, so as to prevent obstructions in the harbor and the seizure and appropriation by the complainant of the bed and navigable waters of the said lake; that the filling in and reclaiming of the submerged lands under the shallow waters of Lake Michigan by the complainants, no matter what the intent of the complainant and its officers and agents may be, is contrary to the laws of said State, and in contravention of not only the charter of the complainant, but also in violation of the ordinances of the defendant; that for the purpose of constructing its said engine-house and appurtenances the complainant is wholly without right, either as riparian proprietor or under and by virtue of any power or authority of its charter, as is claimed by said complainant in its said bill of complaint; that under and by virtue of a certain decree of the circuit court of the United States in and for the northern district of Illinois, on the equity side thereof, in that certain suit or these certain suits between the complainant and defendant which was or were appealed to the Supreme Court of the United States, each, every and all the rights contended for in this suit by the said complainant were fully litigated, discussed and settled in manner and form as the same are explained and set forth in the 146th volume of the Official Reports of the Supreme Court of the United States, which said suit is entitled, "*The Illinois Central Railroad Company v. The City of Chicago*," and by way of estoppel this defendant proffers the record of the decrees and orders and proceedings heretofore had between the said complainant and this defendant in the said cause or causes in both the said courts of the United
63 States as *res judicata*, and as precluding the said complainant *from* again bringing any of the said matters between the complainant and defendant into controversy in any court of competent jurisdiction, whether sitting in equity or at law.

And this defendant, further answering, shows unto the court that it was decided and held by the said Supreme Court in said case or cases so reported in vol. 146 of said reports, that under and by

virtue of its charter, and by and under the said section 3 thereof, the complainant could reclaim no more of the submerged lands of said lake in the harbor of Chicago, and that as riparian proprietor of the land on the west shore of said lake it could only extend its piers, docks and wharves out to the line of water deep enough to afford actual navigation of the waters of said lake, solely for the purpose and in aid of navigation.

And further answering, this defendant says that, as appears by the said bill of complaint, since the year 1852 the said complainant has been the owner of the lands described in said bill of complaint; that it is a fact that the claims put forth in the said bill of complaint might have been put forth in the pleadings of the complainant in the said former litigation, being precisely the same claims made for its lands north of Randolph street, and between 12th and 16th streets, in those cases known as the Lake Front cases; that during all that litigation the lands described in the bill of complaint herein bordered upon and were bounded on the east by Lake Michigan, and were and now are within the border lines of the Chicago harbor and within the corporate limits of the city of Chicago, and that the issues tendered in and by said bill of
64 complaint and joined by this answer are identical with issues made in the said Lake Front cases, so that said issues as determined as aforesaid cannot again be litigated by and between the same parties.

And further answering, this defendant denies that the city of Chicago has revoked the permit given to the complainant to construct said breakwater, and arbitrarily and without right or authority, by the employment of the police force of the city, acting under the order and directions of its mayor, interferes with and forcibly prevents said complainant from filling in and reclaiming the submerged land within the lines of said breakwater and opposite the shore of the land owned in fee-simple by the complainant, while it admits that it is true as alleged in said bill of complaint, that the police of said city have been ordered and directed by its mayor forcibly to prevent, by arrest or otherwise, the agents, servants, and employés of said railroad company, complainant, from filling in and reclaiming said submerged land by placing thereon, for the purpose of filling in and reclaiming said land, any material whatever, however pure and free from noxious and unwholesome matter; and that it is also true that the agents, servants, and employés of The Illinois Central Railroad Company, complainant, have continuously heretofore been and now are forcibly prevented from so filling in and reclaiming said submerged land, by the police of said city acting under the orders and directions of the mayor of said city; but this defendant most emphatically denies that the said railroad company will not be allowed to exercise the power and authority and right conferred upon it by its charter, or that it is forcibly prevented therefrom by the mayor and police of the city of Chicago, or from exercising the riparian rights vested in said railroad company, as the owner in fee of the shore land in

front of which it intends to fill in, and reclaim the sub-
65 merged lands in the shallow waters of Lake Michigan, to use, when reasonably necessary, for the construction of said engine-house the said land submerged by the shallow waters of Lake Michigan, lying between 25th and 27th streets, within the lines of said breakwater, and to erect thereon, when so reclaimed, the aforesaid engine-house and appurtenances thereto necessary for the use and business of the Illinois Central Railroad Company; but the defendant, The City of Chicago, avers the truth to be that the said charter of the Illinois Central Railroad Company does not confer upon it any power or authority or right to fill in and reclaim any part or portion of the bed of Lake Michigan, whether the waters over said bed are shallow or deep, nor does the ownership of the shore lands on said lake confer upon the said railroad company, or any one else, any right or rights as riparian proprietors to fill in the bed of said lake, drive back the waters of said lake, and then convert the said made land to its or his own private purposes, so as to intrude upon, seize and take possession of such part of such great highway, and exclude the public from its free and unobstructed rights in the premises, whether the waters be shallow or deep; that under and by virtue of its charter the said railroad company is absolutely precluded from entering in or upon any lands within the corporate limits of the city of Chicago, without the consent of the city or common council of said city; that the said railroad company is also without power or authority by virtue of its said charter, to fill in and reclaim said submerged land for the purpose of constructing and maintaining said engine-house and its appurtenances.

That it was decided in said Lake Front cases that the legislature of Illinois, had not the right to grant the fee-simple of the
66 bed of said lake to the Illinois Central Railroad Company, or to any one else; and this defendant insists that however great, wealthy and powerful the said railroad company has become, it cannot take of its own volition what it cannot buy, as it admits and boldly asserts in and by its said bill of complaint it is about to do.

And this defendant avers that it is not true, either in law or as a matter of fact, that by the construction of said breakwater and the filling in and reclaiming of said submerged land neither any public or private right of the city of Chicago is violated or infringed; nor is it true that the city has no proprietary interest in lands in the vicinity of the submerged lands which the Illinois Central Railroad Company intends to fill in and reclaim; nor yet is it true that no ordinance, law or regulation which the city of Chicago has heretofore made, or has any lawful right to make, will in any way be violated by the construction of said breakwater and the filling in and reclaiming of said lands.

But this defendant says that the truth of the matter is, and the facts are, that the city of Chicago is by its charter charged with the duty and power of protecting and regulating the harbor and the shore of Lake Michigan within its corporate limits, and exercises to

that end the police power of the State of Illinois; that the title to the bed of Lake Michigan and to the waters over the same, whether shallow or deep, is in the State of Illinois, in trust, however, for the general public; that Lake Michigan is a great highway in which all the people of the city of Chicago as well as the city itself are interested; and that said city is also, by the charter of the said railway company, authorized and empowered, and it is made the duty of said city, to prescribe the terms and limits for the said
67 railway company to lay its tracks and erect its structures within the corporate limits thereof; and that it is further made the duty of the city of Chicago, by its charter, to regulate the police of said city and pass and enforce all necessary police ordinances; that the city council of said city has made and established the following ordinances:

"790. (Police powers)—The harbor master and assistant harbor masters shall be sworn in as special policemen by the superintendent of police, for the purpose of carrying more readily into effect the police regulations of the city concerning the harbor under their charge, and to preserve the public peace and quiet in and about the harbor, and for such purposes shall have all the power and authority of police officers under the laws of the State and the ordinances of the city of Chicago."

"791. (Definitions.)—The harbor shall consist of the Chicago river and its branches to their respective sources, including that portion known as the Ogden canal, and all slips adjacent to and connecting with the Chicago river, the piers, and basins, including the waters of the Government breakwater which lie adjoining to, and extending three miles into the lake between the north and south lines of the city, and all the territory embraced between the limits of said survey as aforesaid shall be a portion of the harbor of the city of Chicago, and shall be subject to the control of the harbor master and to all the rules and regulations of this chapter, or which shall be hereafter provided by the city council. The words 'vessel,' 'crafts' and 'floats' shall be deemed to include every species of steam and other vessels lying or floating in or navigating the harbor."

"793. (Pile-driving—encroachment on harbor lines.)—No person or persons shall drive or place, or cause to be driven or
68 placed any pile or piles, stone, timbers, earth or other obstruction in the harbor of the city without permission of the commissioner of public works, nor shall any person or company use the piers of the harbors erected by the Government of the United States without the permission of the agent of the United States for said piers, or the harbor master. It shall be the duty of the harbor master to report to the city engineer any and all encroachments upon the harbor lines as now established, or which may hereafter be established, and thereupon they shall take such action as may be necessary to enforce the provisions of this chapter."

"795. (Penalties.)—Any person or persons violating any provision of either of the last two sections of this chapter shall, on conviction thereof, be fined not less than twenty-five dollars, nor more

than fifty dollars for the first offense, and not more than seventy-five dollars for each and every subsequent offense."

And that said ordinances are in full force and effect, and that the said arrests complained of in the said bill of complaint was made on complaints respectively for a violation of said ordinances, or some of them, in the police courts of said city, and that this court has no jurisdiction covering the same, nor power or authority to prevent the enforcement of said ordinances.

And this defendant denies that the city of Chicago arbitrarily, wantonly and without any lawful authority, by means of its police, forcibly hinders and prevents and denies to the Illinois Central Railroad Company the exercise of rights vested in said company under and by virtue of its charter, and rights vested in it by reason of its ownership in fee of the shore land, to fill in the submerged lands aforesaid, for the reason, as already shown, that the
69 agents, officers and solicitors of said company are mistaken in their advice, counsel and position as to the scope of the said charter of said company, and as to the nature of the riparian rights which they claim and insist upon.

And this defendant, further answering, says that in entering and intruding upon the bed and waters of Lake Michigan, as the complainant has done and proposes to do, the complainant is wholly without right, power or authority in the premises.

And the defendant, further answering, shows unto the court, that without any right, power or authority, and contrary to law and its duty in its behalf, the said complainant has driven, placed, or caused to be placed or driven, certain piles, stone, timber, earth and other obstructions in the harbor of said city without the permission of the commissioner of public works; that it has done this within the lines of said breakwater east of the shore line between 26th and 27th streets, and that the same has been done forcibly, wantonly and in total disregard of the rights of the public, the title of the State, and the rights and duties of the city of Chicago in the premises, and that if the said city, its officers, agents and employés are enjoined, as prayed in the said bill of complaint, the said complainant will be enabled to perpetrate great wrong and injustice toward every citizen of the State of Illinois and the city of Chicago.

All which matters and things the defendant is ready and willing to aver, maintain and prove as this honorable court shall direct, and prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

CHARLES S. THORNTON,
Corporation Counsel of said City and its Solicitor.

GRANVILLE W. BROWNING, *Of Counsel.*

70 STATE OF ILLINOIS, } ss:
County of Cook, }

Henry Lutzenkirchen, being first duly sworn, does depose and say, that he is secretary of the board of public works of the city of Chicago, and as such is familiar with the facts stated and set forth

in the foregoing answer; that he has heard the said answer read and knows the contents thereof, and that all of the matters and facts therein contained are true as therein stated, and further deponent saith not.

HENRY LUTZENKIRCHEN.

Subscribed and sworn to before me this 12th day of November, A. D. 1897.

WILLIAM H. SEXTON,
Notary Public.

71 And afterwards, to wit: on the twelfth day of November, A. D. 1897, there was filed in the office of the clerk of said court a certain cross-bill, which is in the words and figures as follows, to wit:

STATE OF ILLINOIS, } *ss:*
County of Cook, }

In the Superior Court of said County, November Term, A. D. 1897.

THE ILLINOIS CENTRAL RAILROAD COMPANY, Complainant,
vs.
THE CITY OF CHICAGO, Defendant. } Original Bill.

THE CITY OF CHICAGO, Complainant,
vs.
THE ILLINOIS CENTRAL RAILROAD COMPANY, Defendant. } Cross-bill.

To the honorable the judges of the superior court of Cook county:

The City of Chicago, a municipal corporation created by and organized under the laws of the State of Illinois, the complainant herein, by its solicitor, exhibits this, its bill of complaint, against The Illinois Central Railroad Company, the defendant herein, and respectfully states and shows to the court the following:

1. That heretofore, in the year 1851, your orator, The City of Chicago, then was a municipal corporation organized and acting under its special charter, under which it continued to exist and act until the year 1875, when it became incorporated under the general laws of said State; and that the defendant, The Illinois
72 Central Railroad Company, is a corporation created by and organized under the laws of the State of Illinois, having been duly incorporated by that certain act entitled "An act to incorporate the Illinois Central Railroad Company (in force February 10, 1851)."

2. That heretofore, and on the 9th day of November, 1897, the Illinois Central Railroad Company filed its bill of complaint against the City of Chicago, in equity in this honorable court, in the clerk's office thereof, wherein and whereby, after setting forth and showing very fuliy the origin, the incorporation of said company, the build-

ing of its road, its growth and prosperity, going back to the year 1808, and from thence reciting matters and things appertaining to the means of communication and intercommunication, and transportation, etc., from east to west, and north to south, until the progress of events finds its full realization in the immense extent and importance of the holdings and rights as well as the business of the said railroad company at the present juncture; showing in the said bill of complaint that in the year of 1852 it purchased and paid the full value at that time of certain lands now lying between the lines of Twenty-fifth street and Twenty seventh street produced eastwardly, and that it has since then been and now is seized and possessed of said land in fee-simple, and that by virtue of the riparian rights appertaining thereto as to the waters of Lake Michigan, it has the right and authority as such owner in fee-simple to fill in and reclaim from the waters of said lake the bed of Lake Michigan, so as to secure to itself about five acres of land which it proposes to make directly east of its said lands, carrying the western shore of said lake, and moving the same eastwardly about two hun-
73 dred and fifty feet; that in and by said bill of complaint the said Illinois Central Railroad Company sets forth section 3 of its said charter, and claims that by virtue thereof it has the right, whenever its necessities require, to thus go out into said lake, adjoining its right of way, and *take as much* of the property of the State of Illinois as is requisite, by filling in and reclaiming the bed of said lake so as to increase its possessions, and enable it to construct an engine-house commensurate to its immense business. It shows in and by said bill of complaint that the mayor and police force of said city of Chicago have by force hitherto prevented the said appropriation of so much of said public domain, arrested its agents and employés who were attempting to drive piles and fill in the said lake at said point in the harbor of said city, praying for a perpetual injunction against the mayor and the other city authorities, enjoining them from further interference with the said alleged rights of the said railroad company.

3. And your orator alleges and shows unto your honors that it has rights and duties in the premises, in that in and by the said charter of the said railroad company, it is, in section 8 thereof, prescribed that: "Nothing in this act contained shall authorize said corporation to make a location of their track within any city without the consent of the common council of said city," and that the said railroad company has not obtained the consent of the common council of the city of Chicago to locate said engine-house or any of the tracks leading thereto, connected therewith and necessarily appurtenant thereto; that it proposes and is about to locate its said engine-house of 40 stalls, with a net-work of 40 tracks, connecting the same with its main tracks by filling in and reclaiming the site for said engine-house, and to obtain the ground for the location of said maze or net-work of
74 tracks from the bed and waters of Lake Michigan; that it will take about five acres of ground for the said purposes, and that the said railroad company is about to make that said

five acres of ground by intrusion upon the harbor of the city of Chicago and in and upon the bed and waters of Lake Michigan, without any title, power, right, or authority in law or in equity, in violation of its charter and the charter and ordinances of the city of Chicago; and that the said Illinois Central Railroad Company, its officers, agents and employés are ready and prepared, and are about and threaten to fill in and make for the purpose of a site for said round-house or engine-house, and for location of said tracks, with piles of stone and earth, so as to extend the west boundary line of certain lands, of which the said company claims to be the owner in fee-simple, between Twenty-sixth and Twenty-seventh streets in said city, a distance of seven hundred and fifty feet north and south, by carrying the same out into the lake eastwardly a distance of two hundred and fifty feet, and that unless the said company is, by the order and direction of this honorable court and the people's writ of injunction, enjoined and restrained from filling in and reclaiming the bed and waters of Lake Michigan as it proposes, threatens and is about to do, as aforesaid, for the site of said round-house or engine-house, and tracks appurtenant thereto, the said railroad company will produce irreparable injury to your orator in the premises by obstructing the said harbor and the erection upon said obstruction of a structure of the permanent character of a railroad engine-house of forty stalls and the necessary tracks in connection therewith.

4. That your orator is by the laws of said State charged
75 with the duties of regulating the police, and has the power to pass and enforce all police ordinances within its corporate limits, and to make all regulations in regard to the use of its harbor, and to appoint harbormasters and define their duties, and that it *is* special duties to perform as to preventing encroachments upon the said harbor.

To the end, therefore, that your orator may have adequate relief in the premises, the City of Chicago prays that the defendant, The Illinois Central Railroad Company, may be ruled to answer the above and foregoing cross-bill of said city by a day certain to be named, though not on oath, the necessity of answer being made under oath being hereby expressly waived, and that the premises being seen, the said Illinois Central Railroad Company, its officers, agents and employés may be temporarily as well as perpetually enjoined and restrained from any further interference with the bed and waters of Lake Michigan between Twenty-fifth and Twenty-seventh streets, produced eastwardly, in the city of Chicago, and for such other and further relief in the premises as may be according to equity and good conscience.

And, as in duty bound, your orator will ever pray, etc.

CHARLES S. THORNTON,
Corporation Counsel and Solicitor for Defendant.

GRANVILLE W. BROWNING, *Of Counsel.*

76 STATE OF ILLINOIS, } ss:
County of Cook, }

Henry Lutzenkirchen, being first duly sworn, does depose and say that he is the secretary of the board of public works of the city of Chicago, and as such is familiar with the facts stated and set forth in the foregoing cross-bill, and that he has heard the said cross-bill read and knows the contents thereof, and that all of the matters and facts therein contained are true as therein stated, and further deponent saith not.

HENRY LUTZENKIRCHEN.

Subscribed and sworn to before me this 12th day of November, A. D. 1897.

WILLIAM H. SEXTON,
Notary Public.

77 And afterwards, to wit: on the sixth day of December, A. D. 1897, there was filed in the office of the clerk of said court a certain demurrer, which is in the words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Superior Court of Cook County, November Term, A. D. 1897.

ILLINOIS CENTRAL RAILROAD COMPANY, Complainant, *vs.* CITY OF CHICAGO, Defendant. } Gen. No., 186,957.

The demurrer of the Illinois Central Railroad Company to the alleged cross-bill of the City of Chicago, filed in the above-entitled cause.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said alleged cross-bill of said city contained to be true, in such manner and form as the same are therein set forth and alleged, demurs to said alleged cross-bill, and for causes of demurrer showeth the following:

1. That the said City of Chicago has not, in and by its said alleged cross-bill, made or stated such a cause as entitles it in a court of equity to any relief from or against this defendant touching the matters contained in said alleged cross-bill, or any of such matters.

2. Because the document filed and purported to be a cross-bill by the City of Chicago against the Illinois Central Railroad Company is not in law a cross-bill, and was improperly filed and should be stricken from the files of the court.

78 3. The matters contained and set forth in said alleged cross-bill are not germane to, nor do they arise out of, nor are they in defense to the claim and right of the complainant set forth in the

original bill, and for the protection of which relief is sought by the complainant in said original bill.

4. By said alleged cross-bill the City of Chicago asks an injunction to prevent the violation of a penal ordinance, and the said city has no private right, title or interest whatsoever in respect to the lands which are the subject-matter of the original bill.

5. The relief asked and prayed for in the said alleged cross-bill, does not arise out of or pertain to the right of the complainant, as alleged and set forth in the original bill, and is not germane thereto.

Wherefore and for divers other good causes of demurrer appearing in the alleged cross-bill by the City of Chicago, this defendant demurs to the said alleged cross-bill, and to all the matters and things therein contained, and prays the judgment of this honorable court whether it shall be compelled to make any further or other answer to the alleged cross-bill, and prays to be hence dismissed with its costs in this behalf sustained.

C. V. GWIN,
Solicitor for the Illinois Central R. R. Co.

JAMES FENTRESS, *Of Counsel.*

79 And afterwards, to wit: on the seventh day of December, A. D. 1897, the same being one of the days of the December term of the said superior court, the following among other proceedings were had and entered of record in said court, to wit:

ILLINOIS CENTRAL RAILROAD COMPANY *vs.* CITY OF CHICAGO. } 186,957. Decree.

This day came on to be heard the motion of The Illinois Central Railroad Company, the complainant, for an injunction against The City of Chicago, the defendant in the above-entitled cause, and it being agreed in open court by counsel for the defendant that all the allegations of fact set forth in said bill of complaint shall, for the purpose of this motion, be taken and considered as true, any matter or thing contained in the answer on file to the contrary notwithstanding, and the said motion having been fully heard and understood by the court, after argument as well by counsel for the complainant as for the defendant; it is therefore ordered and directed by the court that said motion be and the same is hereby overruled, and that said injunction be and is hereby denied; and, it is further ordered and adjudged that the bill of complaint in this cause and the cross-bill filed by the city be and the same is hereby dismissed.

And The Illinois Central Railroad Company, the complainant, having prayed for an appeal to the supreme court of this State from the order and judgment of this court overruling the motion and dismissing said bill, it is further ordered that said appeal be and is hereby granted to the supreme court of the State upon the
80 complainant entering into bond within thirty (30) days from this date, conditioned according to law, in the penalty of two hundred and fifty dollars.

And afterwards, to wit, on the eighth day of December, A. D. 1897, there was filed in the office of the clerk of said court, a certain bond which is in the words and figures as follows, to wit:

Know all men by these presents, that we, the Illinois Central Railroad Company and J. C. Welling as surety, of the county of Cook and State of Illinois, are held and firmly bound unto the City of Chicago, also of the same county and State, in the penal sum of two hundred and fifty dollars ($250), lawful money of the United States for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly, severally, and firmly, by these presents.

Witness our hands and seals, this eighth day of December, A. D. 1897.

The condition of the above obligation is such, that, whereas, the said Illinois Central Railroad Company, as complainant, heretofore filed its bill of complaint in the superior court of said county, against the City of Chicago, to enjoin said City of Chicago as prayed in said bill; and whereas, on the seventh day of December, A. D. 1897, a decree was entered in the superior court of Cook county, in the suit aforesaid, denying to The Illinois Central Railroad Company, the complainant, the injunction prayed for in said bill, and dismissing the bill of complaint, from which said decree of the said
81 superior court of Cook county dismissing its said bill of complaint, the said Illinois Central Railroad Company has prayed for and obtained an appeal to the supreme court of said State, upon its entering into bond, conditioned according to law, and in the penalty of two hundred and fifty dollars.

Now, therefore, if the said Illinois Central Railroad Company shall duly prosecute said appeal with effect, and moreover, pay all costs and damages rendered or to be rendered against it in case the said decree shall be affirmed in said supreme court, then the above obligation to be void, otherwise to remain in full force and effect.

ILLINOIS CENTRAL RAILROAD COMPANY, [SEAL.]
By J. C. WELLING, *Vice-Pres't.*
J. C. WELLING. [SEAL.]

Attest:
[SEAL.] W. G. BRUEN, *Ass't Sec'y.*

Approved:
HENRY V. FREEMAN, *Judge.*

82 STATE OF ILLINOIS, } ss.:
County of Cook, }

I, John A. Linn, clerk of the superior court of Cook county, in and for the State of Illinois, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of the record in a certain cause lately pending in said court on the chancery side thereof, wherein The Illinois Central Railroad Company, was the complainant, and The City of Chicago, defendant.

In witness whereof, I have hereunto set my hand, and affixed the seal of said court, at Chicago, this 22d day of December, A. D. 1897.

[Seal Superior Court of Cook County, Illinois.]

JOHN A. LINN, *Clerk.*

83 *Assignment of Errors.*

ILLINOIS CENTRAL RAILROAD COMPANY, Appellant,
vs.
CITY OF CHICAGO, Appellee.

Now comes The Illinois Central Railroad Company, appellant, by C. V. Gwin, its solicitor, and says that there is manifest error apparent in the record and proceedings in said cause, in this, to wit:

1. The court erred in refusing to grant the injunction as prayed for in said bill of complaint.

2. The court erred in dismissing the bill of complaint.

Wherefore, the said Illinois Central Railroad Company prays that the said decree of the said superior court of Cook county, Illinois, be reversed, and that such other decree may be made by the supreme court as shall be agreeable to equity and good conscience, and that this appellant may be restored to all things which it has lost by the said decree.

C. V. GWIN,
Solicitor for Illinois Central R. R. Co.

JAMES FENTRESS, *Of Counsel.*

84 And afterwards, to wit, on the eleventh day of February, A. D. 1898, certain proceedings were had in said court and orders made and entered of record, among which is the following, viz:

ILLINOIS CENTRAL RAILROAD COMPANY
vs.
CITY OF CHICAGO. } No. 106.

Appeal from superior court of Cook county.

Now on this day come the parties hereto, and this being one of the days set apart for the call of the docket under the rules of this court, and it appearing to the court that appellant hath filed herein a duly certified transcript of the record and proceedings of the court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee having entered motion to affirm said judgment and for costs and *procedendo*, and said motions being taken under advisement for final hearing, and the clerk of this court reporting that said cause is now ready to be taken, and said

cause is here submitted for the consideration and judgment of the court:

Therefore it is ordered by the court that this cause be and the same is hereby taken under advisement.

85 At a supreme court, begun and held at Springfield, on Tuesday the seventh day of June, in the year of our Lord one thousand eight hundred and ninety-eight, within and for the State of Illinois.

Present: Joseph N. Carter, chief justice.
Alfred M. Craig, justice.
Jacob W. Wilkin, justice.
James H. Cartwright, justice.
Benjamin D. Magruder, justice.
Jesse J. Phillips, justrice.
Carroll C. Boggs, justice.
Edward C. Akin, attorney general.
Edward A. Baxter, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk*.

Be it remembered to wit: on the eighteenth day of June, A. D. 1898, the same being one of the days of the term of court aforesaid, the following proceedings were, by said court, had and entered of record, to wit:

ILLINOIS CENTRAL RAILROAD COMPANY
vs.
CITY OF CHICAGO. } No. 106.

Appeal from superior court of Cook county.

And now, on this day, this cause having been argued by counsel, and the court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the decree aforesaid, is there anything erroneous, vicious or defective, and that in that record there is no error. Therefore it is considered by the court, that the decree aforesaid be affirmed in all things, and stand in full force and effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the court, that the said appellee recover of and from the said appellant its costs, by it in this behalf expended, and that it have execution therefor.

86 And upon the entering of said order of affirmance the opinion of the court was filed in the office of the clerk, in words and figures following, viz:

Docket No. 103, agenda 14, northern div., Feb., '98.

ILLINOIS CENTRAL RAILROAD COMPANY
v.
CITY OF CHICAGO.

This is a bill in equity filed by the Illinois Central Railroad Company against the City of Chicago, praying for an injunction restraining the city from interfering with or preventing the company from filling in certain land covered by the shallow waters of Lake Michigan, lying between Twenty-fifth and Twenty seventh streets, produced for the purpose of constructing an engine-house thereon. The bill is quite voluminous, but it will only be necessary to set out those provisions which have a direct bearing on the questions involved.

The bill sets out the history of the national charter of the Illinois Central Railroad Company, and its consideration in Congress, resulting in the passage of the act of Congress approved September 20, 1850. (9 U. S. Stats., 466.) By that act the right of way through the public land was granted to the State of Illinois for the construction of the railroad from the southern terminus of the Illinois and Michigan canal to a point at or near the junction of the Ohio and Mississippi rivers, with a branch of the same to Chicago, on Lake Michigan, and another *via* the town of Galena, in said State, to Dubuque, in the State of Iowa, with the right, also, to take the necessary lands, waters and materials of earth, timber, etc., for the construction of the railroad. The act also granted to the State of Illinois, for the purpose of aiding and making the railroad and branches above named, every alternate section of land designated by even numbers, for six sections in width, on each side of the railroad and branches. By the act it was further provided that the railroad and branches should be and forever remain a public highway for the use of the Government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States.

The bill further sets forth that the company was created, organized under and now exists by virtue of the act of the legislature of the State of Illinois approved February 10, 1851, entitled "An act to incorporate the Illinois Central Railroad Company," (Private Laws of 1851, p. 61,) and by its charter it was authorized to survey, locate, construct, complete, alter, maintain and operate a road, with one or more tracks or lines of rail, from the southern terminus
87 of the Illinois and Michigan canal to a point at or near the junction of the Ohio and Mississippi rivers, with a branch of the same into Chicago, on Lake Michigan, and also a branch *via* the city of Galena to a point on the Mississippi river opposite the town of Dubuque, in the State of Iowa; that by section 3 of its charter it was provided as follows: "The said corporation shall have right of way upon, and may appropriate to its sole use and control for the purposes contemplated herein, land not exceeding 200 feet in width through its entire length; may enter upon and take possession of and use all and singular any lands, streams and materials

of every kind for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil-banks, turnouts, engine-houses, shops, and other buildings necessary for the construction, completing, altering, maintaining, preserving and complete operation of said road. All such lands, waters, materials and privileges belonging to the State are hereby granted to said corporation for said purposes; but when owned or belonging to any person, company or corporation, and cannot be obtained by voluntary grant or release, the same may be taken and paid for, if any damages are awarded, in the manner provided in 'An act to provide for a general system of railroad incorporation,' approved November 5, 1849, and the final decision or award shall vest in the corporation hereby created all the rights, franchises and immunities in said act contemplated and provided; * * * *provided*, that nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of said streams."

The bill also avers that the company constructed its line of railroad within the then limits of the city of Chicago in the year 1852, and completed its railroad extending between the *termini* named in its charter, in the State of Illinois, in the year 1857; that the total number of miles of its railroad in the State, upon completion, was 706; that at the time of the construction of its railroad, in 1852, into the city of Chicago, the southern limits and boundary of the city extended only to Twenty-second street; that in 1852 it constructed its line of railroad immediately along the shore and partly over the shallow waters of Lake Michigan from Fifty first street to Twenty-second street, then the southern boundary of the city,
88 and that its railroad was constructed into the city of Chicago through the waters of Lake Michigan, pursuant to an ordinance of the city; that its railroad within the limits of the city was constructed on piling set in the open waters of Lake Michigan east of the shore; that between Park row and Randolph street the distances in a direct east and west line between the shore line and the inner or west line of the piling on which the railroad of the company was constructed through the open waters of Lake Michigan varied from 5 feet at Park row to 310 feet at Madison street, and that the depth of the water along the line of piling between the points above named varied from 2½ to 9½ feet; that the company now owns or controls by lease, and is now operating under one management, the whole of the trunk line as one continuous line from New Orleans, through the States of Louisiana, Mississippi, Tennessee, Kentucky and Illinois, into the city of Chicago; that it controls, by lease or otherwise, under the same management, many other lateral lines in the States above named, and also in the States of Wisconsin, Iowa, Minnesota and Dakota, which connect with and are tributary to the parent line of the company; that the number of miles now owned or controlled by the company under one management exceeds 4,600.

It is further alleged in the bill that the city of Chicago is the business center of the various lines which constitute the system owned by the company; that the business carried on over the terminal

tracks and facilities of the company within the present limits of the city of Chicago is so great and so constantly increasing that the whole of its right of way and lands contiguous thereto, within said limits, are used to their utmost capacity as yards, shops, depot grounds, side tracks, switching tracks, storage tracks, delivery tracks, team tracks and other structures, all of which are absolutely necessary as terminal facilities to enable the company to carry on and conduct its business as a common carrier of freight and passengers, and that all the tracks, structures and appliances of its terminal facilities are necessary and essential to enable the company to carry on its business; that the business of the company as a common carrier greatly increases from year to year, and that it has so continued to increase that its terminal facilities in the city are not wholly adequate for the purposes and uses prescribed and intended by its charter. The bill sets out
89 in detail its business and its increase from year to year, and alleges that its terminal facilities in the city of Chicago have been found to be wholly inadequate to enable the company to carry on its business; that in order to meet the increased business necessities and requirements of the company it is absolutely necessary that the company should construct, operate and use an engine-house 316 feet in diameter and containing forty stalls, together with a machine shop, turn-table, coal chute and other structures; that it has no engine-house whatever at which it is practicable for its engines to be overhauled and fitted for operation; that it has no land whatever unoccupied by other necessary tracks and structures, which is either sufficient in dimensions or suitably located, upon which to locate and construct an engine-house of the necessary dimensions and capacity, with the necessary appurtenances thereto, required and necessary for the business of the company, and that in order to build such engine-house and the appurtenances it is necessary to construct the same upon land covered by the shallow waters of Lake Michigan, at a point between Fifty-first street and Eighteenth street.

It is also set up in the bill that in 1852, at the time of the construction of the road within the city of Chicago, it purchased certain lands lying between Twenty-fifth and Twenty-seventh streets, bordering on the shore of Lake Michigan; that in the deeds the shore of Lake Michigan was designated as the east boundary line thereof, and that the company, as owner, was vested with all the riparian rights and privileges incident to the ownership in fee of the shore land; that in the year 1882 it constructed a breakwater or bulkhead in the shallow waters of Lake Michigan, the same being located and constructed in front of the land which the company purchased in 1852, above referred to, the east and west line of the breakwater on the north extending from a point on the shore continuous with the northern boundary of the land conveyed to the company in 1852, and extending to a point 200 feet easterly from the shore line, running thence southerly a distance of 781 feet, and thence westerly to the shore line, a distance of 325 feet; that the breakwater built by the company in 1882 was constructed on two rows of piling driven into the bed of Lake Michigan,

and the space between the rows of piling was filled in with stone,
90 in order to strengthen the breakwater and enable it to withstand the force of Lake Michigan during periods of storm; that all the shore land embraced within the lines of the breakwater now is, and ever since the year 1852 has been, owned in fee-simple by the company, and that it is entitled to all the riparian rights and privileges incident to the ownership in fee of the shore land; that the superficial area of the land covered by the shallow waters of Lake Michigan lying within the lines of the breakwater and the shore line of Lake Michigan is 195,200 square feet, or 4.48 acres; that the superficial area of the ground necessary for the construction of the engine-house, machine shop, coal chute and other necessary structures appurtenant thereto is 168,426.9 square feet, or 3.86 acres.

The bill further states that in the year 1894 a part of the breakwater referred to as having been constructed by it in the year 1882 was destroyed by a storm on Lake Michigan; that it being necessary, to enable the company to carry on and conduct its business, that an engine-house of sufficient capacity to meet its necessary requirements and demands in conducting its business and to accomplish the objects for which the company was chartered be constructed and erected at a reasonably suitable and proper location, and it being necessary that such engine-house should be erected and constructed upon the lands submerged by the shallow waters of Lake Michigan lying in front of land on the shore of Lake Michigan owned in fee simple by the company, the company caused plans to be made, as before stated, for an engine-house 316 feet in diameter and containing forty stalls or compartments, and under the power, authority and right given and vested in the company by its charter, and in the exercise of its rights as riparian owner, it elected and determined to locate and construct said engine-house on land submerged by the shallow waters of Lake Michigan lying within the limits of the breakwater, and to repair the breakwater and fill in the submerged lands lying within the limits of the breakwater, for the purpose of constructing thereon said engine house and the necessary appurtenances thereto; that the breakwater does not in any way interfere with the navigation of Lake Michigan; that the Secretary of War gave his consent to the repair of the breakwater; that the commissioner of public works of the
91 city of Chicago also gave his consent to the repair; that the company placed upon the ground large quantities of material for repairing the breakwater, the filling in of the lands covered by the shallow waters of Lake Michigan embraced within the lines thereof, and for the construction of the engine-house, and appurtenances thereto on the lands to be filled in; that it repaired the breakwater by driving two rows of piling, and filled in a large part of the space between the exterior and interior line of piling with stone, for the purpose of enabling the breakwater to withstand the force of Lake Michigan; that the company was prevented by the police force of the city of Chicago, acting under the orders and direction of the mayor, from completing the work; that the city of

Chicago, without right or authority, interferes with and prevents the company from filling in the land within the lines of said breakwater.

The bill prayed for an injunction restraining the city from interfering with the company. The superior court denied the application for an injunction and dismissed the bill, and the complainant appealed.

Mr. Justice CRAIG delivered the opinion of the court:

On the application for an injunction the facts set forth in the bill were admitted to be true, and the question presented by this record is, admitting the facts set out in the bill to be true, whether the court erred in denying the motion for an injunction and in dismissing the bill.

It is contended in the argument of counsel for appellant that the Illinois Central Railroad Company has the right and power, under its charter, to enter upon, take possession of and use land covered by the shallow waters of Lake Michigan for the purpose of constructing thereon an engine-house necessary for the altering, maintaining, preserving and complete operation of its road, when such use does not interfere with navigation.

It appears, as has been seen from the allegations of the bill, that in 1852, when the railroad was constructed within the city of Chicago, the company purchased certain lands lying between Twenty-fifth and Twenty-seventh streets, bordering on the shore of Lake Michigan, the shore of the lake being the east boundary line of the lands so purchased. The submerged land in question lies between
Twenty-fifth and Twenty-seventh streets, extending into the
92 lake in front of the land purchased in 1852, enclosed by a breakwater erected by the company in 1882. The breakwater extends into the lake 200 feet on a line contiguous with the north boundary line, extended, of the lands purchased by the company, thence southerly 781 feet, thence westerly a distance of 325 feet to the shore line. If the space thus enclosed should be filled in as is proposed by the company, the area of land purchased by the company bordering on the lake will be increased to the extent of 4.48 acres heretofore covered by the waters of the lake. This tract of 4.48 acres the railroad company proposes to fill in and then erect upon it its engine-house. The railroad company claims the right to fill in the land and erect its engine-house upon it on two grounds: First, upon the ground that section 3 of its charter confers the power; and second, because it owns the fee of the shore lands and has the right as a riparian owner.

Section 3 of the act incorporating the Illinois Central Railroad Company, approved February 10, 1851, provides: "The said corporation shall have right of way upon, and may appropriate to its sole use and control for the purposes contemplated herein, land not exceeding 200 feet in width through its entire length; may enter upon and take possession of and use all and singular any lands, streams and materials of every kind for the location of depots and stopping stages, for the purpose of constructing bridges, dams, em-

bankments, excavations, station grounds, spoil banks, turnouts, engine-houses, shops, and other buildings necessary for the construction, completing, altering, maintaining, preserving and complete operation of said road. All such lands, waters, materials and privileges belonging to the State are hereby granted to said corporation for said purposes; but when owned or belonging to any person, company or corporation, and cannot be obtained by voluntary grant or release, the same may be taken and paid for, if any damages are awarded, in the manner provided in 'An act to provide for a general system of railroad incorporation,' approved November 5, 1849, and the final decision or award shall vest in the corporation hereby created all the rights, franchises and immunities in said act contemplated and provided: * * * *Provided*, That nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of said streams."

93 In the construction of a statute, where the words used are clear and unambiguous they must be taken in their ordinary, natural and commonly received sense. (*Deer v. Chapman*, 25 Ill., 610.) Indeed, where the language of a statute is plain and unambiguous there is no room for construction, and the words used must have their natural meaning, unless some absurd or injurious consequence will result which was not foreseen by the legislature. *Martin v. Swift*, 120 Ill., 488. See, also, Southerland on Const. of Stat., sec. 237.

Adopting the rule of construction indicated, which we regard as the correct one, does section 3 of the charter empower the railroad company, at any time it may see proper, to enter upon and appropriate to its own use, for railroad purposes, lands covered by the waters of Lake Michigan? Conceding that the first clause of section 3 conferred upon the railroad company the right to take for right of way a strip of land 200 feet wide upon the location of its line in 1852, that fact has no bearing on the question involved here. The land for right of way in the city of Chicago and along the entire line was selected upon the location of the line of road in 1852, and as to lands taken for right of way there has been no controversy from any quarter. The land here involved is no part of the 200 feet selected or granted for right of way, but it is a tract covered by water beyond the right of way, and the right to appropriate it is claimed under the second clause of section 3, which declares that the railroad company "may enter upon and take possession of and use all and singular any lands, streams and materials of every kind for the location of depots and stopping stages, for the purpose of constructing * * * station grounds, * * * engine-houses," etc., necessary for the construction and operation of the road. The word "lands," as used, cannot mean any portion of Lake Michigan unless that word is given a meaning different from what is generally understood when the word has been used. Webster, in defining the word "land," says: "Earth, or the solid matter which constitutes the fixed portion of the globe, in distinction from the waters, which constitute the fluid or movable part." Under this definition there is a marked distinction between land and water, so that when

the word "land" is used it cannot be so construed as to include water. Moreover, if the legislature intended, by the use of
94 the word "lands," to include lands covered by water, why also use the word "streams?"—for all streams are but lands covered with flowing water. We think, therefore, it is apparent that the legislature, by the use of the word "lands" in section 3 of the charter, did not intend to include lands covered by the waters of Lake Michigan.

In regard to the word "streams" used in the section, that term has a well-defined meaning. It is defined in the Century Dictionary as follows: "A course of running water; a river, rivulet or brook. Second, a steady current in a river or in the sea, especially the middle or most rapid part of a current or tide, as the Gulf stream. Third, a flow; a flowing; that which flows. Fourth, anything issuing from a source and moving or flowing continuously. Fifth, a continued course or current." In *Trustees of Schools v. Schrall*, 120 Ill., 510, we had occasion to consider what was meant by the use of the word "stream," and it was expressly held that the distinction between a stream and a pond or lake is, that in the one case the water has a natural motion or current, while in the other the water in its natural state is substantially at rest; that this is so, independently of the size of the one or the other; that the fact of some current in a body of water is not of itself, in every instance, sufficient to make it a stream, nor will the swelling out of a stream into broad water sheets make it a lake. The word "stream," so far as we are advised, has never been held to include the waters of a great lake like Lake Michigan. If the word can be applied to a large body of water like Lake Michigan it may also be applied to the ocean.

The language of the charter does not authorize the company to enter upon and take possession of any lands, waters and materials belonging to the State, as seems to be supposed, but the authority is to enter upon "any lands, streams and materials." The last clause of the section has an important bearing, showing that the authority conferred related to streams, and not to the lake. It declares: "Nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of said streams." We are therefore of opinion that the grant in section 3, "all such lands, waters, materials and privileges belonging to the State are hereby granted to said corporation for road purposes," did not include lands covered by the waters of Lake Michigan.

95 But even if the grant in the charter was broad enough to include the waters of Lake Michigan, it does not follow that the railroad company would have the right, at any time it might see proper, to take and appropriate to itself any of the lands covered by the waters of Lake Michigan, provided only that the navigation of the lake is not interfered with. It is true that the State holds the title to the lands covered by the waters of Lake Michigan lying within its boundaries, but it holds the title in trust for the people, for the purposes of navigation and fishery. The State has no power to barter and sell the lands as the United States sells its public lands, but the State holds the title in trust, in its sovereign capacity, for

the people of the entire State, as held it *People v. Kirk*, 162 Ill., 146.

This question was fully discussed in the Supreme Court of the United States in *Illinois Central Railroad Co. v. Illinois*, 146 U. S., 387, and it was there held, as we understand the decision, that it was grants of parcels of lands for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which do not impair the public interests in the lands and waters remaining, which are sustained by the courts. In the discussion of the question the court, among other things, said: "The interest of the people in the navigation of the waters and in commerce over them may be improved, in many instances, by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands, and so long as their disposition is made for such purpose no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interests in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay or of a sea or lake. Such abdication is not consistent with the exercise of that trust which
96 requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and water remaining. * * * A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power, and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace."

It is not proposed, here, to take or appropriate the land in question for the erection of wharves, docks or piers, the construction of which may facilitate or aid the navigation of the waters of the lake, but the sole purpose seems to be to appropriate the submerged land

for the private use of the railroad company. It is unreasonable to believe that the legislature, in the enactment of section 3 of the charter of the railroad company, ever intended to place in the hands of the company unlimited power to go on, from time to time, and appropriate to its own use parcel after parcel of the lands covered by the waters of Lake Michigan, and if such unlimited power was contemplated it transcended its authority. It, in effect, undertook to part with governmental powers, which it could not do.

We are, however, referred to three cases in support of the position of the railroad company: *Rucker v. Illinois Central Railroad Co.*, 14 Ill., 353; *Illinois v. Illinois Central Railroad Co.*, 33 Fed. Rep., 730, and *Illinois Central Railroad Co. v. Illinois*, 146 Ill., 387. We do not regard the case first cited as one having a bearing on
97 the question presented by this record. In that case, after the Illinois Central Railroad Company had located its line of road, with the consent of the city of Chicago, over the shore waters of Lake Michigan, the company applied to the county court of Cook county to appoint appraisers to assess damages to certain parties who owned land on the lake shore. The railroad having been located in front of the premises of said lake-shore owners, and partly over the same, the company sought to condemn this property, but the county court refused the application. Upon petition for *mandamus* to this court a *mandamus* was awarded, and the court held: First, that the railroad company had the right, with the consent of the city, to locate its line of road over the shallow waters of Lake Michigan in the line indicated; second, that the right was not forfeited by the failure to locate prior to January 1, 1852; and third, it was the duty of the county court to appoint appraisers. It thus appears that no question was raised or decided, as we understand the case, in regard to the right of the railroad company to go beyond the 200 feet granted and selected for right of way and take lands covered by the waters of the lake for an engine house or for other railroad purposes named in the charter. As to the second case mentioned, that case was removed by writ of error to the Supreme Court of the United States, and the questions of law involved were decided in *Illinois Central Railroad Co. v. Illinois*, 146 U. S., 353. That case is also relied upon in the argument. There may be found expressions in the opinion of the court which might seem to favor the view of appellant, but when the facts of that case are taken into consideration and the entire opinion is examined we do not think that the case lends support to the position of appellant in this case.

It is also set up in the bill that the railroad company has the right, as a riparian owner, to fill in the lake and erect its engine-house on the new-made land. But this question has not been discussed in appellant's argument, and we must regard it as waived. Moreover, under the facts presented by this record, we are aware of no well-considerd case which would sustain the proposed acts of appellant in filling in the lake and erecting upon the newly made land an engine-house.

The decree of the superior court will be affirmed.

Decree affirmed.

98 And be it remembered, that afterwards, to wit: on the twenty-seventh day of July, A. D. 1898, there was filed in the office of the clerk of said court at Springfield, a certain petition and order for writ of error from United States Supreme Court to the supreme court of Illinois, together with a certain bond, which said petition, order and bond are in the words and figures following, viz:

In the Supreme Court of the State of Illinois.

To the honorable Chief Justice and associate justices of the Supreme Court of the United States of America, Greeting:

Whereas, in the supreme court of the State of Illinois, which was and is the highest court of said State in which the cause hereinafter mentioned could be heard, at a term of said court held at Springfield in the said State of Illinois, to wit: the June term of said court on the eighteenth day of June, A. D. 1898, in the cause wherein The Illinois Central Railroad Company was the appellant, and The City of Chicago was the appellee, then pending in the said supreme court on an appeal from the final judgment or decree dismissing the bill of complaint filed by the said railroad company against the said city to restrain it from arbitrarily, wantonly, and without lawful authority, by means of its police force, from hindering, preventing and denying to the said Illinois Central Railroad Company the exercise by it of rights vested in said company under and by virtue of its charter, it was maintained on the part of the said Illinois Central Railroad

99 Company that such action by the said city of Chicago was had under a pretended ordinance or ordinances of said city, and that said ordinance or ordinances, as well as said action of said city aforesaid, impaired the obligation of said railroad company's charter or contract with the State of Illinois, and was in violation of section 10, article 1, of the Constitution of the United States; and, it was also claimed by the said railroad company that said action of the city of Chicago, and said decree dismissing its said bill, deprived it of its property, secured it by its said charter, without compensation and without due process of law, in violation of the fifth and fourteenth amendments of the Constitution of the United States, and a final judgment of said supreme court of the State of Illinois was entered in said cause affirming the said judgment or decree aforesaid of the superior court of Cook county, and, I do hereby certify that there was drawn in question in said cause the validity of a statute of or an authority exercised under, the State of Illinois, on the ground of their being repugnant to the Constitution of the United States, and the decision thereon was in favor of their validity; and, there was also drawn in question in said cause a title, right, privilege or immunity, specially set up and claimed by the Illinois Central Railroad Company under the Constitution of the United States, and that the decision of the said supreme court of the State of Illinois was against the title, right, privilege or immunity so specially set up and claimed.

It is therefore ordered that a writ of error be allowed in this cause, and that a citation be issued accordingly.

JOSEPH N. CARTER,
Chief Justice of the Supreme Court of Illinois.

100 Know all men by these presents, that we, the Illinois Central Railroad Company, as principal, and James Fentress, as surety, are held and firmly bound unto the City of Chicago in the full and just sum of two thousand dollars ($2,000) to be paid to the said City of Chicago, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of July in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas, lately at a supreme court of the State of Illinois, June term, A. D. 1898, thereof, in a suit depending in said court, between The Illinois Central Railroad Company, the complainant, and The City of Chicago, the defendant, a decree was rendered against the said Illinois Central Railroad Company, and the said Illinois Central Railroad Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said decree in the aforesaid suit, and a citation directed to the said City of Chicago citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington within thirty days from the date thereof,

Now the condition of the above obligation is such, that if the said Illinois Central Railroad Company shall prosecute said writ
101 of error to effect, and answer all damages and costs if it fail to make the said plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

ILLINOIS CENTRAL RAILROAD COMPANY, [SEAL.]
By J. C. WELLING, *Vice-Pres't.* [SEAL.]
JAMES FENTRESS, *Surety.* [SEAL.]

Attest:
[SEAL.] W. G. BRUEN, *Ass't Sec'y.*

Approved by—
JOSEPH N. CARTER,
Chief Justice of the Supreme Court of Illinois.

STATE OF ILLINOIS, } ss:
County of Cook, }

Before me, the undersigned David W. Ross, a notary public in and for said county and State, this day personally appeared James Fentress, whose name is signed as surety to the above and foregoing bond, and being duly sworn by me upon his oath doth say, that he is the owner in fee-simple of real estate situate in said county; that the same is free from all encumbrances whatever, and that the

market value thereof is more than ten thousand dollars, free from all debts, judgments, liens and encumbrances thereon.

JAMES FENTRESS.

[SEAL.] Sworn and subscribed to before me this the 25th day of July, A. D. 1898.

DAVID W. ROSS,
Notary Public.

102 In the Supreme Court of the United States.

ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiff in Error,
vs.
CITY OF CHICAGO, Defendant in Error.

And now comes the said Illinois Central Railroad Company, by Sidney F. Andrews, its solicitor, this 26th day of July, 1898, and says that in the record and proceedings in the above-entitled case, there is manifest error in this, to wit:

I.

That said supreme court of the State of Illinois erred in rendering its said judgment in this, that the plaintiff in error, The Illinois Central Railroad Company, was and is thereby deprived of its property without due process of law, contrary to the fourteenth amendment to the Constitution of the United States.

II.

That the said supreme court of the State of Illinois erred in rendering its said judgment in this, that by the said judgment the property of the plaintiff in error, The Illinois Central Rail-
103 road Company, was taken for public use without just compensation, contrary to the said fourteenth amendment to the Constitution of the United States.

III.

That the said supreme court of the State of Illinois erred in rendering its said judgment in this, that by the said judgment the plaintiff in error, The Illinois Central Railroad Company, is denied the equal protection of the laws, contrary to the fourteenth amendment to the Constitution of the United States.

IV.

That the said supreme court of the State of Illinois erred in rendering its said judgment in this, that the charter contract between the Illinois Central Railroad Company and the State of Illinois, as construed and enforced by the said judgment, deprives the Illinois Central Railroad Company of its property without due process of law, contrary to the fourteenth amendment to the Constitution of the United States.

V.

That the said supreme court of the State of Illinois erred in rendering its said judgment in this, that the charter contract between the Illinois Central Railroad Company and the State of Illinois, as construed and enforced by the said judgment, deprives and takes from the said Illinois Central Railroad Company its property without compensation, contrary to the fourteenth amendment to the Constitution of the United States.

104 VI.

That the said supreme court of the State of Illinois erred in rendering its said judgment in this, that the charter contract between the Illinois Central Railroad Company and the State of Illinois, as construed and enforced by the said judgment, denies to the said Illinois Central Railroad Company the equal protection of the laws, contrary to the fourteenth amendment to the Constitution of the United States.

VII.

That the said supreme court of the State of Illinois erred in rendering its said judgment in this, that the said judgment in effect sustains the validity of the action of the city of Chicago in forcibly hindering, by means of its police force, the said Illinois Central Railroad Company from enjoying the rights, privileges, and immunities conferred on it under its charter contract with the State of Illinois, contrary to the fourteenth amendment to the Constitution of the United States.

VIII.

That the said supreme court of the State of Illinois erred in rendering said judgment in this, that by the said judgment the said court upholds the validity of certain ordinances of the city of Chicago, enacted by said city under an act to provide for the incorporation of cities and villages, in force July 1, 1872, under and by virtue of which said ordinances, and by means of its police force, the said city hindered, prevented and denied to the said
105 Illinois Central Railroad Company the exercise by it of certain rights vested in said Illinois Central Railroad Company under and by virtue of its charter contract with the State of Illinois, approved February 10, 1851, entitled "An act to incorporate the Illinois Central Railroad Company," which said ordinances as upheld by the said judgment, impair the obligation of said contract between the said State of Illinois and the said Illinois Central Railroad Company, and are repugnant to article one (1), section ten (10), of the Constitution of the United States.

IX.

That the said supreme court of the State of Illinois erred in rendering its said judgment in this, that it denies the right of the plaintiff in error, The Illinois Central Railroad Company, to enjoin the

city of Chicago from forcibly, by its police, preventing the plaintiff in error from occupying and using the lot of land mentioned in the bill filed herein for the erection of an engine-house, as is provided for in the charter contract between the plaintiff in error and the State of Illinois, and ejecting it therefrom, which said forcible denial by said city of the right of the plaintiff in error to so use said land and ejecting it therefrom was done by said city of Chicago, claiming to act under a charter granted by said State in 1872, and certain ordinances, all of which were passed after said charter contract of the plaintiff in error with the State of Illinois was executed, which said acts of the said city of Chicago, as aforesaid, done under said charter and ordinances impaired the obligation of the charter contract of the plaintiff in error with the said State of Illinois, contrary to article one (1), section ten (10), of the Constitution of the United States.

106

X.

That the said supreme court of the State of Illinois erred in rendering its said judgment in this, that it denies to the plaintiff in error, The Illinois Central Railroad Company, the right to enjoin the city of Chicago from continuing to hinder and prevent it from the enjoyment of its property rights under its charter contract with the State of Illinois, the said city of Chicago claiming the right to continue to interfere with and prevent said company from enjoying its said charter rights by virtue of certain ordinances passed by said city under its charter from the said State, the said charter and said ordinances being enacted long subsequent to the execution of said contract by the plaintiff in error with the said State of Illinois, and the said judgment of the supreme court of Illinois in denying the injunction prayed upholds the said action of the said city, and the authority under which it claimed the right to act, and by the said judgment the plaintiff in error is denied protection from future similar acts by said city, whereby its said property rights under its said charter contract with the said State are impaired and denied it, and it is prevented from enjoying the privileges and rights secured it under its said charter contract and the obligations thereof are impaired, contrary to article one (1), section ten (10), of the Constitution of the United States.

XI.

That the said supreme court of the State of Illinois erred in rendering its said judgment in this, that whereas the city of Chicago, claiming to act under a statute of the State of Illinois, under
107 which it is incorporated as a municipality of said State, and by virtue of certain ordinances enacted by it, did, by means of its police force, prevent and hinder and continues to prevent and hinder the said plaintiff in error, The Illinois Central Railroad Company, from using and enjoying a certain lot of land for the purpose of erecting thereon an engine-house, necessary for the proper operation of its railroad, and necessary for the purpose of its fully discharging the obligations assumed by it to the public under its

charter, and which said lot of land had been granted it for such purpose by its charter contract with the State of Illinois, long prior to the passage of the statute incorporating the said city of Chicago, or the enactment by said city of the said ordinances under which it deprived, as aforesaid, and continues to deprive the plaintiff in error from the use and enjoyment for the purpose aforesaid of the said lot of land, and said judgment of the supreme court, denying the relief prayed for by the plaintiff in error and refusing by its said judgment to protect the said plaintiff in error against the aforesaid acts of said city, and from a continuation thereof, thereby upholds the validity of the said acts of the city of Chicago, and of the authority under which it acted, whereby and wherein the obligation of the charter contract between the plaintiff in error and the State of Illinois was impaired, contrary to article one (1), section ten (10), of the Constitution of the United States.

XII.

That the said supreme court of the State of Illinois erred
108 in rendering said judgment in this, that the said judgment was otherwise contrary to the Constitution of the United States, and the amendments thereto.

Wherefore the said plaintiff in error, The Illinois Central Railroad Company, prays that the judgment of the said supreme court of Illinois be reversed.

SIDNEY F. ANDREWS,
Solicitor for Plaintiff in Error.

JAMES FENTRESS, *Of Counsel.*

Endorsed on cover: Case No. 16,956. Illinois supreme court. Term No., 371. The Illinois Central Railroad Company, plaintiff in error, *vs.* The City of Chicago. Filed August 18th, 1898.

No. 114.

Brf. of Guthrie, Ayer & Fentress for P. E.

Office Supreme Court U. S.
FILED
OCT 9 1899
JAMES H. McKENNEY
CLERK.

Filed Oct. 9, 1899.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 114.

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in error,
vs.
THE CITY OF CHICAGO.

Error to the Supreme Court of the State of Illinois.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

WILLIAM D. GUTHRIE,
For plaintiff in error.

BENJAMIN F. AYER,
JAMES FENTRESS,
Of counsel.

WASHINGTON, October Term, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 114.

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in error,

vs.

THE CITY OF CHICAGO.

Error to the Supreme Court of the State of Illinois.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

This writ of error presents for review a final decree of the Supreme Court of Illinois (173 Ill. 471), which affirmed a decree of the Superior Court of Cook county dismissing the bill of complaint filed by the Illinois Central Railroad Company to obtain an injunction restraining the city of Chicago from interfering with the exercise of the right of the railroad company to fill in, for railroad purposes, certain land submerged by the shallow waters of Lake Michigan, in front of property owned by the railroad company in fee and situated between Twenty-fifth and Twenty-seventh streets in said city. The purpose of the railroad company in reclaiming the land was to erect thereon an engine house, which is necessary in the operation of its road. The railroad company asserted the right to enter upon this land by virtue of the grant contained in its charter of February 10, 1851, and the city asserted the power to deny the exercise of this right by virtue of the act of April 10, 1872, under which it was organized and subsists as a municipal

corporation, and by virtue of certain ordinances adopted under the authority of that act.

The history of the various efforts by Congress and the legislature of Illinois to secure the construction of a railroad from the Great Lakes on the north to the Gulf of Mexico on the south as an enterprise and instrumentality of great national as well as state concern and interest, and the recognized imperative public necessity and utility of such a railroad are first set out in the bill. It is shown that, prior to 1850, all these efforts had resulted in failure. In that year, Congress legislated upon the subject; and, for the purpose of inducing and aiding the construction of a railroad having a "branch of the same to Chicago, on Lake Michigan," granted to the State a right of way through the public lands, and also granted certain sections of land on each side of the road and its branches, and provided that any such railroad and branches were to "be and remain a public highway, for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States." Act of Congress of September 20, 1850, C. 61, 9 Stat. 466. In pursuance of this act of Congress, the Illinois Central Railroad Company was incorporated in Illinois by special charter. In and by that charter, grants were made and rights and privileges conferred; and certain duties and obligations were imposed—among others, to build the railroad within a fixed period with a branch running "into the city of Chicago, on Lake Michigan," and to pay the State a percentage of the gross receipts of the railroad. If the incorporators named did not accept the charter, then any other company approved by the State officers might do so. Act of February 10, 1851; Priv. Laws Ill. 1851, p. 61. The

incorporators named in the act duly accepted the charter (record, pp. 4–8). The provisions of the charter which are particularly material to the present inquiry are quoted in the margin for convenience of reference.[1]

The railroad company proceeded, in compliance with the requirement of its charter, to locate its road and a branch running "into the city of Chicago, on Lake Michigan," and constructed its line within the limits of the city during the year 1852 (p. 8). The bill alleges that the railroad company "constructed the line of its railroad immediately along the shore and partly over the shallow waters of Lake Michigan from Fifty-first street to Twenty-second street, the said southern boundary of said city, and thence its railroad was constructed into the city of Chicago

---

[1] SEC. 2. The said corporation is hereby authorized and empowered to survey, locate, construct, complete, alter, maintain and operate a railroad, with one or more tracks, or lines of rails, from the southern terminus of the Illinois and Michigan Canal, to a point at the city of Cairo, *with a branch of the same to the city of Chicago, on Lake Michigan;* and also a branch, via the city of Galena, to a point on the Mississippi river, opposite the town of Dubuque, in the state of Iowa.

SEC. 3. The said corporation shall have right of way upon, and may appropriate to its sole use and control, for the purposes contemplated herein, land, not exceeding two hundred feet in width through its entire length; may enter upon and take possession of, and use all and singular any lands, streams and materials of every kind for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turnouts, engine houses, shops and other buildings necessary for the construction, completing, altering, maintaining, preserving and complete operation of said road. All such lands, waters, materials and privileges belonging to the State, are hereby granted to said corporation for said purposes; but when owned or belonging to any person, company or corporation, and cannot be obtained by voluntary grant or release, the same may be taken and paid for, if any damages are awarded, in the manner provided in "An act to provide for a general system of railroad incorporations," approved November fifth, 1849; * * *provided*, that nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of said streams.

SEC. 8. * * Nothing in this act contained shall authorize said corporation to make a location of their track within any city, without the consent of the common council of said city.

SEC. 10. Said corporation may construct their said road and branches over or across any stream of water, watercourse, road, highway, railroad or

through and upon the waters of Lake Michigan pursuant to an ordinance of the common council of said city" (*id.*). At this time the southern boundary of the city extended only to Twenty-second street. It was subsequently extended to Thirty-first street by the act of February 12, 1853; to Thirty-ninth street by the act of February 18, 1861, and to One Hundred and Thirty-eighth street by the annexation of the village of Hyde Park in 1889. Priv. Laws Ill. 1853, p. 609; *id.*, 1861, p. 118. The reason why the city required that the route of the railroad should be along the lake front was undoubtedly because at that time it was the most convenient and safe place for a railroad to enter the city. This ordinance, so locating the railroad on the lake front, was recognized by the Illinois legislature in 1861 and 1863 in the acts amendatory of the charter of the city. Priv. Laws, Ill., 1861, p. 136; Priv. Laws, 1863, p. 96. The charter and the portions of the acts of 1861 and 1863 referring to the ordinance are printed in the appendix to this brief.

---

canal, which the route of its road shall intersect, but the corporation shall restore the stream or watercourse, road or highway, thus intersected, to its former state, or in a sufficient manner not to have impaired its usefulness. * *

SEC. 15. * * *Third.*—That said company shall proceed to locate, survey and lay out, construct and complete said road and branches, through the entire length thereof, * * with a branch also diverging from the main track at a point not north of the parallel of thirty-nine and a half degrees north latitude, and running on the most eligible route *into the city of Chicago, on Lake Michigan.* That the central road or main track shall be completed, with at least one line of rails, or single track, with the necessary turn-outs, stations, equipments and furnishings, within four years from the date of the execution of said deed of trust, and the branches within six years from the said date.

SEC. 18. In consideration of the grants, privileges and franchises herein conferred upon said company for the purposes aforesaid, the said company shall, on the first Mondays of December and June, in each year, pay into the treasury of the State of Illinois five per centum on the gross or total proceeds, receipts, or income derived from said road and branches, for the six months then next preceding.

SEC. 27. This act shall be deemed a public act, and shall be favorably construed for all purposes therein expressed, and declared in all courts and places whatsoever. * *

The ordinance required that the railroad should enter the city at or near the intersection of its then southern boundary with Lake Michigan and should follow the shore; and this route necessarily compelled the construction of the road upon piling set in the open waters of Lake Michigan at distances from the shore of from 5 feet at Park Row to 310 feet at Madison street in a depth of water from 2½ feet at Park Row to 9½ feet at Monroe street (pp. 8, 9). The city of Chicago had no power then, and has none at the present time, to grant any portion of the lands submerged under the waters of Lake Michigan. The title to these lands was solely in the State or its grantees.

In 1852, a controversy arose between the railroad company and private owners of land fronting on the lake as to the right conferred by the railroad company's charter. The railroad company desired to condemn shore property and riparian rights for railroad purposes, and asserted that it had the right to do so under section 3 of its charter. This claim was challenged by the property owners, and it was insisted that the charter did not confer the right to enter upon and appropriate any portion of the submerged lands of Lake Michigan. The decision of the Supreme Court of Illinois upon this point at the June term, 1853, as hereinafter more fully explained, was in favor of the railroad company, and *it was expressly adjudged that it had the right under its charter to enter upon and appropriate such submerged lands for railroad purposes, including an engine house. Illinois Central Railroad Co.* v. *Rucker*, 14 Ill. 353, 359.

The legislature of Illinois, in three instances, has recognized that the Illinois Central Railroad Company had located its track over the submerged lands of Lake Michi-

gan and had entered upon and appropriated portions thereof. This recognition will be found, first, in the act of February 18, 1861, amending the city charter, which referred to the ordinance and the Illinois Central Railroad and its location on the lake front (Priv. Laws Ill., 1861, p. 136); secondly, in the act of February 13, 1863, which also amended the charter and similarly referred to the location of the road (Priv. Laws Ill., 1863, p. 96); and, thirdly, in and by the act of April 16, 1869 (Pub. Laws Ill., 1869, p. 245), which, among other things, provided as follows:

> "SEC. 3. The right of the Illinois Central Railroad Company, *under the grant from the State in its charter*, which said grant constitutes a part of the consideration for which the said company pays to the State at least seven per cent. of its gross earnings, and under and by virtue of its appropriation, occupancy, use and control, and the riparian ownership incident *to such grant, appropriation, occupancy, use and control in and to the lands submerged or otherwise lying east of the said line running parallel with and four hundred feet east of the west line of Michigan avenue*, in fractional sections ten (10) and fifteen (15), township and range as aforesaid, *is hereby confirmed*."

The Illinois Central Railroad Company now seeks to fill in a space of about four acres lying wholly within a breakwater which was built in 1882, and which encloses shallow waters that are not navigable. It owns the adjacent shore land in fee. On the filled-in or reclaimed land, it intends to build an engine house, absolutely necessary in the operation of its road. The right to do so is denied on the ground that the charter conferred no right and contained no grant in respect of the submerged lands of the lake.

The bill of complaint sets forth the extent of the system of the Illinois Central Railroad Company, the immense expense of constructing and maintaining its trunk

lines, representing an investment of over one hundred millions, the many lines owned and controlled by the railroad company and tributary to it as the parent line, aggregating under one management more than 4,600 miles, and the fact that the city of Chicago has been made the business center and focus of all these various lines of railroad (pp. 9, 10). A map is annexed to the bill of complaint as "Exhibit E," which shows the ramifications of this immense system, one of the greatest and most important in the United States (p. 10).

Many details are averred as to the constantly increasing business of the railroad company, which is now more than twenty-fold its average yearly business from 1855 to 1861. Thus, it is shown that in 1870 the suburban trains ran south only to Oakwood, or Sixty-seventh street, in the village of Hyde Park, a distance of 8.21 miles, and that there were only five such trains daily; but that at the time of the filing of the bill in 1897 the suburban service of the railroad company extended from Randolph street to Homewood, on the main line, a distance of 23.33 miles; to South Chicago, on the branch line, a distance of 12.72 miles, and to Blue Island, on another branch line, a distance of 18.75 miles, and that 106 trains ran daily in each direction, making a total of 212 suburban trains running in and out of Randolph street station daily (pp. 10, 11), and these trains, of course, are constantly running by and in front of the premises at Twenty-seventh street, where the railroad company now proposes to locate the engine house. The bill does not show the increase of tonnage and passengers from 1852 to 1870; but it does show the increase between 1870 and 1897. The freight tonnage of the railroad in 1870 was 1,623,944 tons, whilst in 1897 it was 9,948,267 tons, an increase of over six-fold, and

the passengers carried in 1870 were 1,376,585, whilst the passengers carried in 1897 were 12,827,205, an increase of nearly ten-fold (p. 11). It is shown that the amount contributed to the state treasury, under the railroad company's charter, measured by the gross receipts of the railroad company, increased from $29,751.59 in 1855 to $625,593.30 in 1897, an increase of over twenty-fold, and that the aggregate contributions to the state treasury during that period were $16,666,859.86 (p. 12).

The bill then sets forth the facts establishing the inadequacy of the present terminal facilities of the railroad company, the necessity for more track room (p. 13), and the causes therefor, including the elevation of the tracks required by ordinances of the city of Chicago passed in May, 1897, as the incline and approach necessitated by this elevation of the tracks will require a large part of the railroad company's grounds, including the ground formerly occupied by the engine house between Fourteenth and Fifteenth streets (pp. 13, 14). It is also shown that the freight yards of the company at Randolph street are cramped and incapable of handling the business conducted by the railroad company, and that frequently fifteen hundred cars or more in number must be held out and cannot be delivered to the consignees for days at a time on account of the congested condition and small capacity of the freight yards (p. 14); that the necessity for repair shops, etc., is constantly increasing, and that immense sums have been expended lately by the railroad company in the development of its terminal facilities (*id.*). The particular necessity for the accommodation of the one hundred and thirty-five engines which are in daily use is then fully explained, and it is shown that these engines must be overhauled, fitted for work, inspected,

coaled, watered and fired daily (pp. 15, 16). In view of these facts, it cannot be disputed that increased terminal facilities are absolutely necessary. The bill alleges that the engine house and its accompanying structures are indispensable for the purposes of operating the railroad in order to meet the increased business requirements, and that, if constructed, they will be barely sufficient to accommodate the present necessities of the railroad company for taking care of the engines in daily use (pp. 16, 20). It is also shown that the railroad company owns no land unoccupied by necessary tracks and structures which could be used for this engine house; "and that in order to build said engine house and the appurtenances, it is necessary to construct the same upon land submerged by the shallow waters of Lake Michigan, at a point between 51st street and 16th street" (p. 16). The railroad company further shows that, at the point where it proposes to fill in and build the engine house, it has been the owner in fee simple of the shore or upland since 1852 (pp. 18, 19); that all the submerged land in question is and has been since 1882 enclosed by a breakwater (p. 18), and that neither the breakwater nor the filling-in will interfere with navigation (p. 20). There is, therefore, no question whatever as to the rights of riparian owners or as to substantial interference with or impairment of practical navigation involved in the case.

The bill further alleges that in 1882 the railroad company constructed, in the shallow waters of Lake Michigan at the point now in question, in front of the land owned in fee simple by it, a breakwater or bulkhead, and that the line of the bulkhead extended 200 feet into the lake from a point on the present shore line, thence southerly

a distance of 781 feet, and thence westerly to the present shore line 325 feet, as shown by the line lettered *a*, *b*, *c*, *d* on the map annexed to the bill as Exhibit D (p. 19). This breakwater entirely encloses the small space of submerged land which the railroad company now desires to fill in or reclaim. A part of the breakwater so constructed in 1882 was destroyed by storms on Lake Michigan in 1894 (pp. 19, 20), and is about to be repaired or restored. The superficial area of submerged land lying within the breakwater and the shore line of the property so owned by the railroad company is 4.48 acres, and the superficial area of the ground needed for an engine house and other necessary structures appurtenant thereto is 3.86 acres (p. 19). The breakwater does not in any way interfere with or impede the navigation of Lake Michigan; it is not located within the limits of the harbor of the city of Chicago; the exterior line of the existing breakwater runs an average distance of 250 feet from the present shore line; the depth of water does not exceed ten feet at the exterior line and shallows as it approaches the shore, and the construction of the breakwater and the filling in of the land within its limits will not substantially impair the public interests in the remaining lands and water of Lake Michigan (p. 20).

Before attempting to rebuild or repair the breakwater which was constructed in 1882 and which had been partly destroyed by storms in 1894, as aforesaid, the consent and approval of the War Department were obtained, as well as the permission of the commissioner of public works of Chicago (pp. 20, 21).

The bill then shows that the railroad company had proceeded to repair and rebuild the breakwater, and had

already filled in a large part of the space between the exterior and the interior line of piling with stone for the purpose of enabling the breakwater to withstand the force of Lake Michigan, when the work was interfered with and prevented by the officials of the city of Chicago (pp. 21, 22). The bill then prays for relief by way of injunction (p. 23), and the allegations are sufficiently specific and substantial to warrant the interposition of a court of equity to protect property rights.[1]

Although the answer denies some of the material allegations of the complaint, yet when the case came on for final hearing, it was agreed in open court by the counsel for the city "that all the allegations of fact set forth in said bill of complaint shall for the purposes of this motion be taken and considered as true, any matter or thing contained in the answer on file to the contrary notwithstanding" (p. 46); and the question now presented for adjudication is, as stated by the court below, whether, admitting the facts set out in the bill to be true, the court below erred in affirming the final decree dismissing the bill (p. 54).

There are, however, certain portions of the answer which should be referred to. The city, although admitting and averring its intention to interfere with the filling in and the construction of the engine house, nevertheless alleges that "it disclaims all intention or design of interfering with the repair or reconstruction of the breakwater at the point named in said bill of complaint" (p. 36). It also alleges that it is a municipal corporation organized and subsisting under and by virtue of the act of April 10, 1872, and refers to certain ordinances which it has adopted under the authority of such legislation (pp. 37, 40). These allegations are important as showing the subsequent

[1] *City Railway Co.* v. *Citizens' Railroad Co.* 166 U. S. 557, 563.

legislation relied upon by the city to support its acts. This legislation, as now given effect, constitutes, as the plaintiff in error contends, an unconstitutional impairment of the obligation of its charter contract.

The answer further pleads the judgments in the so-called Lake Front cases, *Illinois Central Railroad* v. *Illinois*, 146 U. S. 387, as estoppel and *res adjudicata*, claiming that all the questions now involved were litigated and adjudged therein.

The bill was dismissed in the Superior Court of Cook county, the court of original jurisdiction, and an appeal taken to the Supreme Court of Illinois, where the decree was affirmed. This writ of error seeks to review and reverse that decision. The opinion of the court below will be found in the record at pages 50–58. The ground of the decision was that the railroad company had no right under its charter to enter upon or appropriate any part of the submerged lands of Lake Michigan for an engine house.

The error now assigned and urged is that the court below erred in denying to the Illinois Central Railroad Company the benefit of the grant and contract contained in its charter, and gave effect to subsequent legislation impairing the obligation of that contract.

I.

The title to lands under the waters of Lake Michigan.

It is now the general rule of law in this country that the ownership of and dominion and sovereignty over lands covered by the navigable lakes, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof when that can be done without substantial impairment of the interest of the public in such waters, and subject to the paramount right of Con-

gress to control their navigation so far as may be necessary for the regulation of commerce. The statement of the rule in these words was recently reiterated by this court in *Morris* v. *United States*, 174 U. S. 196, 236, citing *Illinois Central Railroad* v. *Illinois*, 146 U. S. 387, and *Shively* v. *Bowlby*, 152 U. S. 1; and there is no occasion for further discussion of the general subject.

It is likewise established that the extent of any title or right of a riparian owner to wharf out, fill in, or reclaim to the point of practical navigability is one of local law. *Hardin* v. *Jordan*, 140 U. S. 371, 380; *Shively* v. *Bowlby*, 152 U. S. 1, 46; *Water Power Co.* v. *Water Commissioners*, 168 U. S. 349, 361. The Supreme Court of Illinois has recently decided that the proprietor of the upland has no right merely as riparian owner to wharf out or otherwise encroach upon the waters of Lake Michigan. *Revell* v. *The People*, 177 Ill. 468, 479.

The railroad company did not contend below (p. 58), and does not claim in this court, that merely as riparian owner it had the right to fill in or reclaim this submerged land for necessary railroad purposes. The allegations of the riparian ownership in the railroad company showed, however, that neither the city nor private land owners had any riparian rights to be protected or compensated for. The point in the case at bar is not as to the rights of the railroad company as riparian owner on Lake Michigan, under the rules of general or local law, which are not disputed, but is as to whether or not the right to enter upon and appropriate the land in question for necessary railroad purposes is reasonably within the fair import of the grant embodied in the charter of the Illinois Central Railroad Company. The fact that no private rights or

interests of riparian ownership are interfered with or encroached upon may well incline a court to recognize the reasonableness and propriety of the selection of such a locality for an engine house. Where, as in the case at bar, the railroad company owns the upland, the only questions are (1) as to whether the State has made any grant of the submerged land, and then (2) as to whether the grant or the proposed action thereunder will interfere with private rights, or substantially impair the interest of the public in the waters, or, in other words, interfere with practical navigability.

There can be no doubt, as matter of law, that, if the State of Illinois had passed an act specifically granting to the Illinois Central Railroad Company, as owner of the upland, the right to fill in, for railroad purposes, this small parcel of submerged land between the breakwater and the shore, no question could have been raised as to the validity of the grant. *The People* v. *Kirk*, 162 Ill. 138, 151; *Saunders* v. *N. Y. C. & H. R. R. R. Co.*, 144 N. Y. 75, 86.

The point decided below was that the charter of the Illinois Central Railroad Company did not grant to the railroad company any right whatever to enter upon or take possession of any land covered by the waters of Lake Michigan for the construction of an engine house, however necessary such a structure might be for the maintenance and operation of the railroad and the accommodation of the public, and whether or not such entry was upon shallow waters and in no degree interfered with practical navigability or the interests of the public. The same reasoning and rule would prevent the filling in for any depot, station, station grounds, turnouts or "other buildings necessary * * for the complete operation of said road,"

for these indispensable appurtenances of railroads are included in the same sentence of the charter. The decision does not purport to overrule the former adjudication in *Illinois Central Railroad Co.* v. *Rucker*, 14 Ill. 353, but it draws a distinction between locating the company's "line of road over the shallow waters of Lake Michigan on the line selected" and the taking of "lands covered by the waters of the lake for an engine house or for other railroad purposes named in the charter" (p. 58). Therefore, the result is, following this construction, that, although the railroad company was authorized by its charter to locate and construct its track over the submerged lands of Lake Michigan, it had and has no right to fill in or reclaim a single foot of submerged land for the purpose of building depots, stations, engine houses and the other structures which are absolutely essential in the practical operation of the railroad; although the same clause of the charter which grants land for the right of way strip also grants lands of the State outside of that strip where "necessary * * for the complete operation of said road." The grant, in so far as it affects lands, is in no sense broader in the one case than the other.

The courts of Illinois have recognized, as the now well-settled rule in that State, that a railroad company may from time to time take or acquire by grant, purchase or condemnation proceedings as much land for tracks, stations, workshops, engine houses, etc., as may be necessary for the complete operation of the railroad; that this power is not exhausted by the location or completion of the railroad; and that it is a continuing right and power to be exercised from time to time as increased facilities may be required to meet the growth and development of the cities, towns and villages along the line. *Chicago, Burl-*

ington and Quincy Railroad Co. v. *Wilson*, 17 Ill. 123, 127; *Fisher* v. *C. & S. R. R. Co.*, 104 Ill. 323, 326; *C. & W. I. R. R. Co.* v. *I. C. R. R. Co.*, 113 Ill. 156, 162. Therefore, the defendant cannot maintain the proposition that the location of the right of way along the margin of the lake in 1852 exhausted the power conferred in the grant. The legal position of the railroad company is exactly the same as if its system of tracks, as laid in 1852, covered, as they more than do now at Twenty-seventh street, the whole two hundred feet of right of way, and it were then seeking to build its first engine house. Its business to-day over these tracks is forty times what it was in 1855 and twenty times what it was in 1869. The court will take cognizance of the fact, for it is common knowledge, that such an immense business as that of the Illinois Central Railroad Company requires constantly increasing terminal facilities. No one can challenge the reasonableness of the proposal to build a larger engine house or the advisability of constructing it at a point where such a structure cannot interfere with practical navigability, and where it will be least annoying and offensive to the neighborhood.

The *necessity* for this engine house in the operation of the railroad cannot, as we have seen, be reasonably questioned. In view of the allegations of the bill, which the city has consented "shall be taken and considered as true," that necessity cannot be doubted. But, even if there were no such concession, the court would recognize that such an engine house must be adjacent to the tracks. Indeed, it will not be argued that the construction of this engine house *somewhere* along the line on the water front is not inevitable. Is the railroad company to be driven to the necessity of taking for this purpose three or four acres in the business

or residential district of the city, where it would disturb and annoy the community, rather than in a place east of the railroad tracks where it would annoy and disturb no one—a place which cannot be used for navigation, where no private rights are affected, and which is best fitted for the location of an engine house? The railroad company's counsel deem it inconceivable that any one, speaking and solicitous for the public welfare and convenience, will argue on behalf of the city that this engine house and the network of tracks, involving the making up and breaking up of trains, the discharge of steam and the heat, smoke, cinders and noise incident to a building holding forty locomotives, should be located *west* of the tracks. The location of the engine house at a distance from this central point would seriously inconvenience, embarrass and endanger freight and passenger traffic, and greatly increase the cost of handling trains, with all the injurious consequences attending delay and increased cost of operation. The two hundred and twelve suburban trains run continually throughout the day and most of the night. They are necessarily crowded with passengers during a few hours of morning service and a few hours of evening service, and then must run every few minutes. The tracks for such a service should be as free as practicable, and they should obviously be on the west side of the system of tracks on the lake front in order to facilitate rapid and convenient loading and unloading. The location of an engine house on the *west* would evidently interfere with this suburban service. If the engine house were located on the west of the tracks or right of way, the tracks now used for the "two hundred and twelve suburban trains running into and out of the Randolph street station daily" would have to be continually crossed,

increasing unnecessarily the danger of operation for all trains, and subjecting the great body of citizens using those trains to delay and danger, all of which can be easily and altogether avoided by locating the engine house on the *east*, or lake front, thus leaving free the tracks on the west, particularly those for suburban service. In fact, we may venture to suggest that, if the railroad company had located its engine house on the *west* of its maze or network of tracks to the inconvenience and annoyance of a residential or business neighborhood and to the immeasurable danger of its passengers, the community would have risen against such an unnecessary intrusion and danger and insisted upon a location *east* of the tracks.

Moreover, if the railroad company had not been originally compelled to build along the lake front, and had been allowed to locate its tracks in the center of the city of Chicago, the cost of construction and maintenance would not only have been immensely decreased, but the right of way would have been more valuable, the tracks more accessible, and the collection and delivery of freight and passengers more convenient. The compulsory location along the lake front was a great disadvantage, for it involved building for miles on piles and the construction of expensive breakwaters to protect the tracks and the city. As the railroad company was compelled to locate on the lake front at immense expense, surely it is eminently fair that it should be given the right to construct necessary terminal facilities without unreasonable interference on the part of the city. It would seem to be a most proper case for the application of the doctrine of equitable estoppel. *City Railway Co.* v. *Citizens' Railroad Co.*, 166 U. S. 557, 566.

But the court below argues that the power to enter upon the waters of the lake cannot be so broad "that the railroad company would have the right, at any time it might see proper, to take and appropriate to itself any of the lands covered by the waters of Lake Michigan, provided only that the navigation of the lake is not interfered with" (p. 56). No such broad pretension is made. The railroad company does not claim arbitrary power. There must be in each case a reasonable necessity for the appropriation, and the locality selected must be reasonably fit for the purpose, having regard to the public convenience. If the building of an engine house at this point would produce great private or public inconvenience, or impair the practical use of the waters of the lake, then the railroad would have to go elsewhere. But that is not pretended. So far as appears, it is the most suitable, convenient and safe place that could have been selected. The argument based on the possibility of abuse would, if sound, strike down the statutes in every State granting power to condemn for railroad or other public purposes; and it has been repeatedly argued that such power might be exercised to the great prejudice of private and public interests. But such reasoning has been refuted in too many familiar instances to have any weight now or to require refutation.

There exists no sound reason for denying the right to take or condemn a water front if needed for railroad purposes. In *Matter of N. Y. C. and H. R. R. R. Co.*, 77 N. Y. 248, 258, Miller, J., said:

> "The objection, that land under water cannot be taken, by reason of any provisions of law relating to the taking of land, or that the acquisition of land under water, with or without water front, stands upon different principles from that of ordinary land, is not, we think, available in this application. * * Such a rule would lead to great embarrassment in

> the prosecution of railroad enterprises, and would not be a practical application of the law relating to the acquisition of land in such cases. * * When, therefore, it appears that land is required * * by a railroad company for piers and wharves, which increase the facilities for transportation and benefit the public at large, no sound reason exists why it should not be used for such a purpose."

The later New York cases are *Matter of Staten Island Rapid Transit Co.*, 103 N. Y. 251, 255; *Kerr* v. *W. S. R. R. Co.*, 127 N. Y. 269, 275; *N. Y. C. & H. R. R. R. Co.* v. *Aldridge*, 135 N. Y. 83, 88. See, also, *Shively* v. *Bowlby*, 152 U. S. 1, 21.

II.

THE TRUE CONSTRUCTION OF THE GRANT IN THE RAILROAD COMPANY'S CHARTER.

As the controversy involves the contract clause of the Federal Constitution, this court will regard it as not only its prerogative but its duty to inquire into the facts and determine according to its own views and upon its own responsibility the true construction of the charter of the Illinois Central Railroad Company. The ruling of the Supreme Court of Illinois in the decision under review will not, therefore, be followed unless it commends itself to this court as correct, and the construction announced in the former decision of the same court in 1853 may be adopted as the true construction of the charter. *Douglas* v. *Kentucky*, 168 U. S. 488, 500; *Chicago &c. Railroad* v. *Nebraska*, 170 U. S. 57, 68; *McCullough* v. *Virginia*, 172 U. S. 102, 109; *Water Power Co.* v. *Street Railway Co.*, 172 U. S. 475, 487. The jurisdiction of this court is sustained by the fact that the city has grounded its right of interference upon its supposed charter powers as authorized by the act of April 10, 1872 (p. 36). *N. O. Waterworks* v. *La. Sugar Co.*, 125 U. S. 18, 31; *Hamilton Gas Light Co.* v. *Hamilton City*, 146 U. S. 258, 266;

City Railway Co. v. *Citizens' Railroad Co.*, 166 U. S. 557, 563.

It has always been the common understanding of lawyers that land covered by water passed by a grant of land, provided the boundaries named, or the surrounding circumstances, or long usage under the grant indicated such an intention. As Mr. Justice Gray said in *Shively* v. *Bowlby*, 152 U. S. 1, 13:

> "It is equally well settled that a grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any title below highwater mark, *unless* either the language of the grant, or *long usage under it*, clearly indicates that such was the intention."

The railroad company contends that the grant contained in its charter of "all such lands, waters, materials and privileges belonging to the State" included lands under the waters of Lake Michigan. In support of this contention, it is shown that this was the practical construction of the charter by the railroad company and the city itself from the very beginning, as evidenced by the ordinance of 1852, under which the track was located on the lake front; that it was the authoritative construction by the highest court of the State in 1853 at the time the railroad was built; that this has been the "long usage" under the grant; and that this construction has been sanctioned and confirmed by the legislature, which, in the confirmatory act of 1869, referring to the grant of "lands" in the charter, identified them as "*submerged* or otherwise." In addition, every fair presumption should favor the railroad company in view of the provision of section 27 of its charter that "this act shall be deemed a public act, and shall be favorably construed for all purposes therein expressed and declared, in all courts and places whatsoever." This provision was undoubtedly inserted to pre-

vent strict construction and to assure to the incorporators a favorable construction, so as not to allow the manifest purpose and design of the act to be defeated by a strict construction and the denial of the use of means by which alone the main object could be maintained. *Moran* v. *Commissioners of Miami County*, 2 Black 722, 724.

An analysis of the section in question will be of aid in determining its true construction.

The charter, both in section 2 and in section 15, required the railroad company to build its road into the city of Chicago, on Lake Michigan, perhaps intending by the use of the words "on Lake Michigan" to have a railroad and terminus on the lake for the accommodation of the commerce of the lake. In 1851 there was no railroad leading from Chicago to the east, and all the commerce of Chicago and of the State of Illinois tributary thereto was carried to the east by vessels sailing out of the mouth of the Chicago river. There was no outer harbor at that time, nor was there any harbor at the mouth of the Calumet river at South Chicago. But whatever may be the significance and true meaning of the words "on Lake Michigan," the railroad company was bound by the act to locate its track within the city where the city authorities indicated, and the city authorities fixed a course or route nearly all of which was along the lake front, over submerged lands. This location of the route by the city's ordinance of 1852 must, in view of the subsequent statutory recognition and confirmation, be regarded as part of the charter itself. The statute prescribed a route or course "*into* the city of Chicago, on Lake Michigan," and the subsequent location by the common council was the instrumentality designated by the legislature. That route necessarily involved the entry

upon and appropriation of a part of the submerged lands of the lake. It would follow that the right to cross these waters was to be implied from the route so fixed, and that the case is within the rule decided in *Union Pacific R. R. Co.* v. *Hall*, 91 U. S. 343, 350.

The expression "lands, streams and materials *of every kind*" contained in the first sentence of section 3 is followed by the words:

> "All such lands, waters, materials and privileges belonging to the State are hereby granted to said corporation for said purposes."

It may fairly be said that the word "lands" at the beginning of the first sentence of section 3 is thus explained to include land under water by the form of expression in the second sentence—viz., "all such lands, waters," etc. Because, if the word "streams" had been used for the purpose of confining or limiting the right of the railroad company to entry upon "streams," then that word would have been repeated in the sentence immediately following. Instead, however, of repeating the limited term, the legislature used the broader term "waters," which would include the waters of the lake as well as the waters of streams. Is it not reasonable, in view of all the surrounding circumstances, to conclude that the expression "all such lands, waters, materials and privileges belonging to the State" was intentionally used for the purpose of indicating that, under the word "lands," the legislature was granting the right of entry upon all the lands covered by the waters of the State which were reasonably necessary for the purposes named in the charter and did not interfere substantially with navigation? In such a case as this, is it not a fair import that the word "waters" was deliberately selected to indicate the intention of the legislature not to confine the company to streams?

The opinion below is grounded upon two definitions:[1] the one of the word "lands" and the other of the word "streams." The court reasons (pp. 57, 58) that the word "lands" cannot mean any portion of Lake Michigan, because—such is the argument—"there is a marked distinction between land and water in the definition of land"; and, secondly, because, if the legislature had intended by the use of the word "lands" to include lands covered by water, the word "streams" would not have been used, as "all streams are but lands covered by flowing water."

A.

AS TO THE DEFINITION OF "LANDS."

The court below says (p. 55):

> "The word 'lands,' as used, cannot mean any portion of Lake Michigan unless that word is given a meaning different from what is generally understood when the word has been used. Webster, in defining the word 'land,' says: 'Earth, or the solid matter which constitutes the fixed portion of the globe, in distinction from the waters, which constitute the fluid or movable part.' Under this definition there is a marked distinction between land and water, so that when the word 'land' is used it cannot be so construed as to include water."

In answer to this argument, a few definitions from lexicographers may be quoted, although, in the construction of statutes, the narrow, popular or current significance of "dry land" is not to be taken. "Where a term in a statute has acquired at common law a settled meaning, that is ordinarily the technical meaning which is to be given to it in construing a statute."[2]

---

[1] By the settled practice in Illinois, the opinion of the court is a part of the record (Ills. Rev. Stat., ch. 37, sec. 15) and consequently may be examined by this court. *Gross* v. *United States Mortgage Co.*, 108 U. S. 477, 486; *Thompson* v. *Maxwell Land Grant Co.*, 168 U. S. 451, 456.

[2] Endlich Stat. Inter., § 3, citing a number of authorities which sustain the text. See, also, as to the word "land," *Brocket* v. *Ohio and Pennsylvania Railroad Co.*, 14 Pa. St. 241, 243.

The court below only quoted a part of the definition of Webster and omitted the following:

"8. (Law) Any ground, soil or earth whatsoever, as meadows, pastures, woods, etc., and everything annexed to it, whether by nature, as trees, water, etc., or by the hand of man, as buildings, fences, etc.; real estate. Kent. Bouvier. Burrill."

Part of the definition of "land" in the Century Dictionary is as follows:

"1. The solid substance of the earth's surface; any part of the continuous surface of the solid materials constituting the body of the globe: as dry or submerged *land*. * *

"5. Ground considered as a subject of use or possession; earth; soil. In law, *land* signifies any ground forming part of the earth's surface which can be held as individual property, whether soil or rock, or *water covered*, and everything annexed to it, whether by nature, as trees, *water*, etc."

In the Standard Dictionary the definition is:

"In law, *land* means any tract of ground whatever, together with the waters * * standing upon it, and is regarded as indefinite in extent upward and downward."

Before referring to the legal definition, it may be interesting to refer to *Revell* v. *The People*, 177 Ill. 468, in which an information was brought by the Attorney-General against Revell praying that certain piers built into Lake Michigan from his premises on the shore of Lake Michigan might be abated, etc. Mr. Justice Craig, who also delivered the opinion in the case at bar, then used the following language (p. 479):

"Upon an examination of the authorities we think it is clear that the act complained of in the information was a trespass upon the *lands* of the State; that the erection of the piers in the lake in front of appellant's premises was a purpresture. * * It is apparent from the evidence that the effect has been to add new land to his (Revell's) premises, and that the accretions resulting from the construction of the piers have extended the boundary of his premises into the lake. In other words, the erection of the piers has increased appellant's land and diminished the *land* belonging to the State. * * As

has heretofore been said, the lands covered by the waters of the lake belong to the State, and appellant had no right, by any device whatever, to extend his boundary line beyond the water's edge, and when he did so an injury was inflicted on the rights of the State, which might be inquired into and abated in a court of equity on the application of the Attorney General (p. 483). * * As we understand the common law, any structure placed upon the *land* of the State below or beyond the water's edge in the waters of the lake is a purpresture, and may be abated in a proceeding instituted on behalf of the People. A shore owner may, no doubt, erect on his own land such structures as may be necessary to protect his land from erosion, provided such structures do not interfere with navigation, but he has no right to intrude upon the *lands* of the State *unless authorized by the State* (p. 489). * * It may be conceded that under the doctrine of protection a shore owner may erect structures on his own land for protection against erosion, but as we understand the law he has no right to enter upon the *lands* of the State and erect thereon such structures, and when he undertakes to do so he is a trespasser. * * No reason occurs to us why the structure should not be abated (p. 491)."

It is submitted that it will be difficult to reconcile this use of the word "land" with the definition of the same word in the decision now under review.

In Coke on Littleton, Book 1, § 1, 4a, it is said:

"'*Terre*,' Terra, Land, in the legall signification, comprehendeth any ground, soile, or earth whatsoever; as meadowes, pastures, woods, moores, *waters*, marishes, furses, and heath. *Terra est nomen generallissimum, et comprehendit omnes species terræ.* * * Also, the waters that yeeld fish for the food and sustenance of man are not by that name demandable in a *præcipe;* but the land whereupon the water floweth or standeth is demandable."

So in Blackstone's Commentaries, Book II., page 18, Coke's definition as above given, is referred to, and it is also said:

"It (land) legally includeth also all castles, houses, and other buildings: for they consist, said he, of two things; *land*, which is the foundation, and *structure* thereupon; so that if I convey the land or ground, the structure or building passeth

> therewith. It is observable that *water* is here mentioned as a species of land, which may seem a kind of solecism; *but such is the language of the law:* and, therefore, I cannot bring an action to recover possession of a pool or other piece of water by the name of *water* only, * * but I must call it * * *land covered with water.* For water is a movable, wandering thing, and must of necessity continue common by the law of nature. * * But the land, which that water covers, is permanent, fixed, and immovable: and therefore in this I may have a certain substantial property; of which the law will take notice, and not of the other."

To the same effect is Cruise's Digest, Title 1, § 2.

The legal lexicographers are unanimous in holding that the definition of "land" includes lands covered by water. See Burrill, Jacobs, Black, Rapalje, Lawrence, Wharton, Anderson, Tomlinson, and Bouvier.

The decisions to the same effect are numerous.

Thus, in *Rogers* v. *Jones*, 1 Wendell 237, 255, it is said:

> "It cannot be doubted, that when a patent or grant conveys a tract of land by metes and bounds, the land under water as well as other land will pass, if the land under water lies within the bounds of the grant."

So in *Nostrand* v. *Durland*, 21 Barb. (N. Y.) 478, 482.

> "Ordinarily, a grant of water, under any designation, does not convey the land which it covers. In order to pass the title to the land, the word 'land,' or something equivalent to it, should be inserted in the conveyance. In the case of *Rogers* v. *Jones*, (1 Wend. 237), the patent was for all the tract of *land* within certain boundaries which included the harbor of Oyster-bay, and it was therefore very properly decided that the title to the *fundus* of the waters passed to the grantee."

As Patteson, J., said in *Regina* v. *Leeds & Liverpool C. Co.*, 17 A. & E. 671, 685:

> Lands "are not the less land for being covered with water."

The doctrine that "land" includes land under water was also recognized or applied in *Beckman* v. *Kreamer*, 43 Ill. 447; *Washington Ice Co.* v. *Shortall*, 101 Ill. 46, 56, which cites with approval *The State* v. *Pottmeyer*, 33 Ind. 402,

where the question was extensively considered; *Green* v. *Armstrong*, 1 Denio (N. Y.) 550, 554; *Canfield* v. *Ford*, 28 Barb. (N. Y.) 336, 338; *Mott* v. *Palmer*, 1 N. Y. 564, 572; and *Kingsley* v. *Holbrook*, 45 N. H. 313, 319.

B.

AS TO THE DEFINITION AND USE OF THE WORD "STREAMS."

The opinion below also relies upon the definition of a "stream," which is shown to be running water; and, as Lake Michigan has no ordinarily perceptible stream, it is said that it is not to be included in the word "stream." It is said that the use of the word "streams" shows that the legislature could not have intended, by use of the word "lands," to include lands under water; for otherwise—so the reasoning runs—it would not have used the word "streams," which "are but lands covered by flowing water" (p. 56). Of course, the court will not fail to perceive that if "streams" are but *lands* covered by flowing water, so the bed of the lake adjacent to the shore and covered by the shallow waters of the lake is but *land* covered by still water, which is what the railroad company contends.

But the word "streams" may be so explained as to show that its use is entirely consistent with the view that the word "land" included land covered by water.

At the time when the charter was granted in 1851, it was understood in many States, as it is to-day in New York, for example, and, we believe, in Illinois, that the navigable streams of the State could not be bridged, diverted, encroached upon, or crossed on culverts or piles for railroad purposes, except with the express authority of the State. *Escanaba Co.* v. *Chicago*, 107 U. S. 678, 683; *Ill. R. Packet Co.* v. *Peoria Bridge Asso.*, 38 Ill. 467, 474; *City of Chicago* v. *McGinn*, 51 Ill. 266, 270; *McCartney*

v. *C. & E. R. R. Co.*, 112 Ill. 611, 635; *Works* v. *Junction Railroad*, 5 McLean, 425, 435. The rule was that express power to enter upon or cross or bridge navigable streams had to be included in the act of incorporation of a railroad. The numerous acts of incorporation of railroads in Illinois at or about that time would seem to indicate that this view is correct.[1] The charter of the Illinois Central Railroad Company, at the end of section 3, shows that, in the use of the word "streams," navigable streams were referred to, because the power is limited by the following:

> "*provided*, that nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of said streams;"

and section 10 requires that any stream or watercourse intersected shall be restored "to its former state or in a sufficient manner not to have impaired its usefulness." The route prescribed by the charter had to cross navigable streams, namely, the Calumet river, the Fever or Galena river, the Illinois river and the Cache river. *Union Pacific R. R. Co.* v. *Hall*, 91 U. S. 343, 350.

It is, therefore, quite apparent that in the grant of power

---

[1] An act to amend an act entitled "An Act to Incorporate the Central Military Tract Railroad Company," Laws of Illinois, 1852, p. 36. An act to amend an act entitled "An Act to amend an act entitled 'An Act to Incorporate the Peoria and Oquawka Railroad Company,'" *Ibid.*, p. 193. An act to amend the charter of the Illinois River Railroad Company, Priv. Laws Illinois, 1857, Part I., p. 105. An act to incorporate the Great Northwestern Railroad Company, *Ibid.*, p. 274. An act to amend an act entitled "An Act to Construct a Railroad from Jacksonville in Morgan County to Alton in Madison County," *Ibid.*, p. 287. An act to incorporate the Galesburg and Rock Island Railroad Company, *Ibid.*, Part II., p. 1312. An act to incorporate the Galesburg and Muscatine Railroad Company, *Ibid.*, p. 1437. An act to incorporate the Illinois Farmers Railroad Company, Priv. Laws Illinois, 1859, p. 449. An act to incorporate the Monticello Railroad Company, Priv. Laws Illinois, 1861, p. 502. An act to incorporate the Illinois Farmers' Railroad Company, Priv. Laws Illinois, 1867, vol. 2, p. 737. An act to incorporate the Apple River Valley Railroad Company, Priv. Laws Illinois, 1869, vol. 2, p. 913. An act to incorporate the Belleville and O'Fallon Railroad Company, *Ibid.*, p. 936.

the word "streams" was added for the purpose of giving power in respect of navigable streams or rivers, and not in any sense or degree for the purpose of qualifying or limiting the scope of the grant of the "lands" of the State or to exclude the submerged lands of Lake Michigan.

III.

The effect of contemporaneous construction and legislative recognition or confirmation.

The statement of facts has shown the contemporaneous construction by the city authorities embodied in and evidenced by the location under the ordinance of 1852. This location along the lake front by the common council of Chicago is "indirectly the act of the State," and justly to be read as part of the charter, particularly when confirmed by subsequent judicial decision and legislation. *City Railway Co.* v. *Citizens' Railroad Co.*, 166 U. S. 557, 563. The statement also shows an authoritative construction in 1853 by the highest court of the State, and in addition legislative recognition of the location in 1861 and 1863 and express confirmation of the grant in the act of 1869. The effect of this authoritative construction and confirmation may now be considered.

A.

Shortly after the passing of the ordinance of 1852, it became necessary for the railroad company to institute condemnation proceedings for the purpose of assessing the damages of owners of property along and adjacent to the right of way of the railroad company as located and built on the shore of the lake. A case was commenced which involved numerous parcels of land, including upland and submerged land, but the condemnation was sought by the railroad company *not for tracks or right of way, but "for*

the location thereon of their depots, station grounds, ENGINE HOUSES, *turn-tables, turn-outs, and other buildings and erections necessary for the construction and complete operation of the said road.*" The right of the railroad company under its charter "to enter upon and occupy any portion of the bed of Lake Michigan," or to encroach upon and interrupt in any manner the navigation of said lake, was directly and distinctly challenged. The lower courts refused to appoint commissioners to assess damages, and thereupon an application was made to the Supreme Court of the State for a mandamus to compel the county judge to appoint these commissioners. On the part of the property owners, it was claimed that the railroad company had no right under its charter to enter upon and occupy any portion of the bed of Lake Michigan for railroad purposes (*Illinois Central Railroad Co.* v. *Rucker*, 14 Ill. 353, 355). On the part of the railroad company, it was contended (p. 358):

> "1. That the bed of Lake Michigan belonged to the State of Illinois.
>
> "2. That the State had power partially to obstruct the navigation of the waters of the lake.
>
> "3. That the State had, by the express words of the charter, given the railroad company the authority to locate their road over the bed, and in the waters of the lake."

The case was decided by the Supreme Court of Illinois at the June Term, 1853. The decision of the court was to the effect (p. 359) "that the relator [the Illinois Central Railroad Company] has the right *by its charter* to locate the road over the premises in question—the city of Chicago having assented." The only consent given by the city of Chicago was contained in the ordinance of 1852 fixing the location of the *track* under section 8 of the charter.

This decision remained unchallenged as a rule of property, upon the faith of which millions have been invested in this great railroad system, for practically forty-five years, until the decision now before this court for review. This authoritative decision of the Supreme Court of Illinois is a conclusive construction of the statute, and may be regarded "as much a part of the statute as the text itself," in view of the fact that in reliance thereon the road was located and built along the lake front. *German Bank* v. *Franklin County*, 128 U. S. 526, 538; *Wade* v. *Travis County*, 174 U. S. 499, 509. But it is important to observe that this former decision has not been overruled or its soundness impugned in the case at bar. The Supreme Court of Illinois now declares (February, 1898) that the *Rucker* case involved only the right of way, and that no question was then raised or decided as to the "right of the railroad company to * * take lands covered by the waters of the lake for an engine house or for other railroad purposes named in the charter" (p. 58). This statement is incorrect. If the court will refer to the published report of the *Rucker* case and to an exemplified copy of the record in that case, now filed,[1] it will appear that the controversy

[1] The record in the *Rucker* case shows that no lots, either upland or submerged lands, were sought to be condemned by the railroad for right of way.

The railroad sought to condemn upland for "the location thereon of their depots, station grounds, engine houses, turn-tables, turn-outs and other buildings" in the following lots in the Fort Dearborn Addition to the city of Chicago:

Lots 9, 10 and the south half of Lot 8, all being part of Block 5, described on pages 6, 44, 49, 66, 71, 97, 157, 167, 187.

Lots 1 and 2 in Block 6, described on pages 7, 44, 67, 98, 105, 167, 187, 195.

The north half of Lot 5 in Block 6, described on pages 7, 45, 67, 98, 106, 168, 188, 196.

Lot 6 in Block 6, described on pages 7, 18, 45, 67, 89, 99, 107, 131, 168, 188, 198, 200.

The railroad sought to condemn the rights of the riparian owners in the

was not at all as to the right of way, but expressly involved the power of the railroad company under its charter to condemn and enter upon submerged lands and to use and appropriate the same for railroad purposes, *including engine houses.* The case therefore squarely supports the contention of the railroad company, and cannot be distinguished.

B.

The binding effect of the acts of 1861, 1863 and 1869, as constituting legislative construction, may be best stated in the language of this court in analogous cases. Thus in *The Society for the Propagation, &c.*, v. *The Town of Pawlet*, 4 Peters 480, 502, Mr. Justice Story said:

> "But in the present case, we think, there is abundant evidence in the record to establish the right of the corporation to hold the lands in controversy. In the first place, it is given to them by the royal charter of 1761, which created the town of Pawlet. Among the grantees therein named, is 'the society for the propagation of the gospel in foreign parts,' to whom one share in the township is given. This is a plain recognition, by the crown, of the existence of the corporation, and of its capacity to take. It would confer the power to take the lands, even if it had not previously existed."

In *The United States* v. *Freeman*, 3 How. 556, 564, the correct rule of interpretation was stated as follows:

> "That if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law, that all acts *in pari materia* are to be taken together, as if they were one law. If a thing

---

submerged lands for "the location thereon of their depots, station grounds, engine houses, turn-tables, turn-outs and other buildings" in the following lots in the Fort Dearborn Addition to the city of Chicago:

Lot 6 in Block 6, described on pages 7, 90, 99, 107, 131.

Lot 1 in Block 11, described on pages 8, 46, 68, 100, 108, 169, 189, 201, 202, 204, 205, 206, 207, 208.

Lot 5 in Block 11, described on pages 9, 47, 69, 101, 109, 170, 190, 210.

Lot 7 in Block 11, described on pages 10, 18, 47, 69, 91, 102, 110, 131, 170, 190, 211.

Lot 8 in Block 11, described on pages 10, 47, 49, 70, 72, 102, 111, 158, 171 172, 191, 211, 212.

contained in a subsequent statute, be within the reason of a former statute, it shall be taken to be within the meaning of that statute; *and if it can be gathered from a subsequent statute in pari materia, what meaning the legislature attached to the words of a former statute,* they will amount to a legislative declaration of its meaning, and *will govern* the construction of the first statute."

So in *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 331, the court said:

"Both in principle and authority it may be taken to be established, that a legislative body may by statute declare the construction of previous statutes so as to bind the courts in reference to all transactions occuring after the passage of the law, and may in many cases thus furnish the rule to govern the courts in transactions which are past, provided no constitutional right of the party concerned is violated."

In *Union Pacific R. R. Co.* v. *Hall*, 91 U. S. 343, 350, Mr. Justice Strong said:

"But the amendatory act of 1864 is not to be overlooked. *It is to be regarded in connection with the act of 1862, and interpreted as a part of it.* By its ninth section the company were expressly authorized to construct bridges over the Missouri, and other rivers which their road might pass in its course, for the convenience of their road; and the act declared this authority to be given to enable the company to make convenient and necessary connections with other roads. This enactment may not have been necessary. The power may have been conferred upon the Union Pacific Railroad Company by the act of 1862; and we think it was. But, whether necessary or not, it shows clearly that Congress had in view the construction of the railroad to the Iowa shore of the river. No bridge could be constructed without making use of the Iowa shore."

In *Andes* v. *Ely*, 158 U. S. 312, 322, the objection that a railroad company had not been legally incorporated was held obviated by statutes authorizing the sale of its stock.[1]

[1] See also *White Water Valley Canal Company* v. *Vallette*, 21 How. 414, 425; *Shaw* v. *Norfolk County Railroad Company*, 5 Gray 162, 180; *Whitney* v. *Union Trust Company of New York*, 65 N. Y. 576; *Shepley* v. *Atlantic & St. Lawrence R. R. Co.*, 55 Maine 395, 406; *Richards* v. *Railroad*, 44 N. H. 127, 136.

The same rule obtains in Illinois. Thus, in *McAuley* v. *C., C. & I. C. Ry. Co.*, 83 Ill. 348 (1876), it was objected that a railroad company formed by consolidation with others had no authority to construct a railroad in Chicago over the lands in question. The court said (p. 351):

> "We are of opinion that all the objections on this score are sufficiently obviated by the act of our legislature, entitled 'An act to amend the charter of the Chicago and Great Eastern Railway Company,' approved February 16, 1865. In addition to other amendments made by this act, the third section of the act provides 'that the rate of speed at which the trains and locomotives of the Chicago and Great Eastern Railway Company may be run within the limits of the city of Chicago, shall be under the control of the common council,' etc. * * This amendatory act is a legislative recognition of the existence of this consolidated company, and of the name of the consolidated company adopted by the articles of consolidation, amounting to a legislative ratification of the consolidation which had been effected; and it is also a like recognition of the right of the company to construct a railroad within the city of Chicago."

As to the effect of the confirmatory act of 1869, Mr. Justice Harlan said in the Lake Front cases (*State of Illinois* v. *Illinois Cent. R. Co.*, 33 Fed. Rep. 730, 771):

> "This confirmation covers all that was done by the railroad company prior to April 16, 1869, in the way of filling in the lake, and constructing wharves, slips, piers, tracks, warehouses, etc., between Chicago river and the north line of Randolph street. It also covers the occupancy and use by it for way-ground of the two triangular pieces of ground immediately south of Randolph street. We have already expressed the opinion that what was done in these respects by the railroad company was to be justified by its riparian ownership, by its charter, and by the city ordinances of 1855 and 1856. If, however, we should be in error in so holding, it is clear that its action, in the particulars just stated, was legalized by the confirmatory clause of section 3 of the act of 1869. If what was done by the railroad company prior to April 16, 1869, in the localities discussed in that clause, had been done under legislative authority previously conferred, the com-

pany would undoubtedly have acquired thereby property rights that could not have been taken from it except upon compensation. But subsequent legislative ratification or confirmation of what was done is equivalent to original authority. *Grenada Co. Sup'rs* v. *Brogden*, 112 U. S. 271, 5 Sup. Ct. Rep. 125; *Anderson* v. *Santa Anna*, 116 U. S. 364, 6 Sup. Ct. Rep. 413. This being so, it was beyond the power of the State, consistently with the constitution of Illinois, or the constitution of the United States, to revoke that confirmation, as was attempted to be done by the repealing act of 1873."

Even if the act of 1869 had been validly repealed, it may nevertheless be referred to as evidence of the intention of the legislature and the true meaning of the charter and the grants contained in it. It is a settled rule in the interpretation of statutes that clauses or acts which have been repealed may still be considered in construing the provisions of the same statute or statutes *in pari materia*. *Ex parte Crow Dog*, 109 U. S. 556, 561; *United States* v. *Le Bris*, 121 U. S., 278, 280; *Viterbo* v. *Friedlander*, 120 U. S. 707, 725; *Cope* v. *Cope*, 137 U. S., 682, 688; *Groves* v. *Sentell*, 153 U. S. 465, 478.

The legislation of 1869, in the particular in which it was adjudged to be valid and effective and therefore still unrepealed, did not purport or intend to confer any increased powers upon the railroad company, but simply to recognize and confirm "the *right* of the Illinois Central railroad company under the *grant* from the State in its charter to the lands submerged or otherwise" then described. The railroad company, before the act of 1869, had appropriated, occupied and filled in submerged lands of the lake other than those involved in the Lake Front cases, and it continued to do so afterwards. Its action in this regard was under the grant in its charter, for it had no other right, and without such grant its action would have been a purpresture; and the confirmatory act

recognized and authoritatively declared that the *right* under the original *grant* in the charter was sufficiently broad to authorize an entry upon "lands submerged or otherwise."

C.

This contemporaneous construction by the city, the highest court of the State and the legislature is certainly most persuasive, and it ought to be conclusive. The importance which should be attached to contemporaneous construction is admirably stated by two of the text writers on the subject of the construction of statutes. Their statements of the law are so accurate and are so fully supported by the authorities annotated, that they may be submitted as succinctly stating the well-established rules of statutory construction.

In Maxwell on the Interpretation of Statutes, 4th ed., p. 423, the author says, speaking of the English rule:

> "It is said that the best exposition of a statute or any other document is that which it has received from contemporary authority. *Optima est legum interpres consuetuedo. Contemporanea exposito est optima et fortissima in lege.* Where this has been given by enactment or judicial decision, it is of course to be accepted as conclusive. But, further, the meaning publically given by contemporary, or long professional usage, is presumed to be the true one, even when the language has etymologically or popularly a different meaning. It is obvious that the language of a statute must be understood in the sense in which it was understood when it was passed; and those who lived at or near the time when it was passed, may reasonably be supposed to be better acquainted than their descendants with the circumstances to which it had relation, as well as with the sense then attached to legislative expressions; moreover, the long acquiescence of the legislature in the interpretation put upon its enactment by notorious practice, may, perhaps, be regarded as some sanction and approval of it. It often becomes, therefore, material to inquire what has been done under an act; this being of more or less cogency, according to circumstances, for determining the meaning given contemporaneous exposition.

Sutherland, in his work on Statutory Construction, states the rule of the American courts as follows (p. 391):

> "A contemporaneous construction is that which the statute receives soon after its enactment. This, after the lapse of time, without change of that construction by legislation or judicial decision, has been declared to be generally the best construction. It gives the sense of the community as to the terms made use of by the legislature. If there is ambiguity in the language, the understanding of the application of it when the statute first goes into operation sanctioned by long acquiescence on the part of the legislature and judicial tribunals, is the strongest evidence that it has been rightly explained in practice. A construction, under such circumstances, becomes established law."

The author's citation includes the following leading authorities: *U. S. Bank* v. *Halstead*, 10 Wheat. 51; *M'Keen* v. *Delancy's Lessee*, 5 Cranch 22; *Packard* v. *Richardson*, 17 Mass. 122, and *The People* v. *Loewenthal*, 93 Ill. 191. To these citations may be added: *Hahn* v. *United States*, 107 U. S. 402, 406; *Robertson* v. *Downing*, 127 U. S. 607, 613; *United States* v. *Alabama Railroad Co.*, 142 U. S. 615, 621; *United States* v. *Union Pacific Railway*, 148 U. S. 562, 572.

IV.

THE EFFECT OF THE FORMER DECISION IN THE LAKE FRONT CASES. (*Illinois Central Railroad* v. *Illinois*, 33 Fed. Rep. 730; 146 U. S. 387.)

The answer of the city of Chicago in the suit at bar pleads, by way of estoppel and *res adjudicata*, the judgment in what is known as the Lake Front cases, 146 U. S. 387, and alleges "that the issues tendered in and by said bill of complaint and joined by this answer are identical with the issues made in the said Lake Front cases, so that said issues as determined as aforesaid cannot again be litigated by and between the same parties" (p. 38).

An examination of the record and decisions in the former litigation thus pleaded will show not only that

the right to appropriate or fill in the submerged lands now in question was not involved in that suit, but that the points and principles then decided support the present contention of the railroad company.

The former litigation was begun by an information or bill in equity, filed by the Attorney-General of the State of Illinois, in the name of its people, against the Illinois Central Railroad Company and the city of Chicago. The issues and the controversy as framed by the pleadings—that is, the information on behalf of the State, the cross-bill of the city, and the answers of the railroad company—related (1) to the title to submerged or reclaimed lands on the lake front and structures thereon situated between the Chicago River and Sixteenth street; (2) to the title to certain wharves and piers built out into the lake between those points; and (3) to the title to the submerged lands constituting the bed of Lake Michigan in front of property within the same boundaries, and for a distance of one mile into the lake. There can be no possible doubt upon this point if the opinion of the court in 146 U. S. 387, and of Mr. Justice Harlan in 33 Fed. Rep. 730, are examined. Of course, the record in the former case will be referred to by the court, in order to ascertain exactly what was the property then involved.

It was adjudged in the United States Circuit Court, as clearly appears from the opinion of Mr. Justice Harlan, 33 Fed. Rep. 730, (1) that the railroad company had title in fee, for railroad purposes, to all the submerged land in question which it had reclaimed from the lake, and was entitled to maintain the wharves, stations and other structures constructed upon such reclaimed lands, "which said wharves and other works so constructed,

and so far as constructed, are lawful structures and not encroachments upon the domain of the State of Illinois or upon the public right of navigation, or upon the property, interests or estate of the city of Chicago"; but it was also decided (2) that the right or title of the railroad company to the bed of the lake in front of such structures as conferred by the act of April 16, 1869, had been validly revoked and canceled by the repealing act of 1873. The railroad company was, therefore, perpetually enjoined—

> "from erecting structures in or filling with earth or other materials any portion of the bed of Lake Michigan as it now exists, and as shown on said Morehouse map, east or in front of said fractional sections ten and fifteen—that is, east or in front of the grounds now occupied and used by it, between the Chicago river and the centre line of Sixteenth street, extended eastwardly, except that said company may complete the slip or basin already commenced immediately north of Sixteenth street extended, with a wharf on each side of it not exceeding 100 feet in width in each, where vessels coming into such slip or basin may load and unload, and upon which tracks of the company may be laid."

But the railroad company was not enjoined from filling in or building structures elsewhere along the lake front, south of Sixteenth street.

The act of 1869 had two distinct objects in view: one object was to confirm certain *rights* of the railroad company under the *grant* from the State in its charter; the other object was to grant to the railroad company a large tract of submerged lands in the outer harbor of Chicago in front of its track and structures. The first object was held to constitute valid and effective legislation beyond the power of any subsequent legislature to impair by repeal. The act to that extent is still in full force and effect, and the railroad company relies upon it here. The second object was held to have been effectively

canceled and defeated by the repeal of 1873 on the ground that such a grant was revocable.

Upon the first branch of the case—namely, as to the submerged land which the railroad company had entered upon and appropriated or reclaimed under the grant in its charter—the decision was in its favor; and it was adjudged that the act of 1873, in so far as it sought by repealing the act of 1869 to revoke or annul the confirmatory clause of the last-named act, was void under the constitutions of both Illinois and the United States.

From this decree in the Lake Front cases, all parties appealed, and this court affirmed the decree below with a modification relating solely to and directing an investigation for the purpose of ascertaining and determining whether the piers then in question extended beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on the lake. The judgment of this court concluded as follows (146 U. S. 464):

> "And, if it be determined upon such investigation that said piers, or any of them, do not extend beyond such point, then that the title and possession of the railroad company to such piers shall be affirmed by the court; but if it be ascertained and determined that such piers, or any of them, do extend beyond such navigable point, then the said court shall direct the said pier or piers, to the excess ascertained, to be abated and removed, or that other proceedings relating thereto be taken on the application of the State as may be authorized by law; and also to order that similar proceedings be taken to ascertain and determine whether or not the pier and dock, constructed by the railroad company in front of the shore between Twelfth and Sixteenth streets extend beyond the point of navigability, and to affirm the title and possession of the company if they do not extend beyond such point, and, if they do extend beyond such point, to order the abatement and removal of the excess, or that other proceedings relating thereto be taken on application of the State as may be authorized by law.

"Except as modified in the particulars mentioned, the decree in each of the three cases on appeal must be affirmed, with costs against the railroad company; and it is so ordered."

In the Lake Front cases, there figured prominently an engine house or roundhouse of the railroad company situated at Fifteenth street, which is referred to in the bill of complaint in this case (pp. 14–16), and also the machine shop. *The engine house and machine shop had been built, as the evidence showed, on reclaimed submerged land in the space filled in east and in front of Fifteenth street. They were originally built in 1855 and rebuilt in 1860; and are the "roundhouse and machine shops" referred to in the confirmatory act of 1869.* The right to maintain and operate this engine house on this reclaimed property, and the title of the railroad company to the reclaimed land were adjudged in the Lake Front cases; yet there was absolutely no right to enter upon, appropriate, or fill in this land or build this engine house, except such as was granted and conferred by the charter of 1851. The railroad company now seeks to exercise the very same power for a similar imperative and necessary railroad purpose. We have, therefore, an express adjudication in the decision in the Lake Front cases of the right of the railroad company to do under its charter on the lake front at Fifteenth street exactly what it now seeks to do at Twenty-seventh street, a power which, of course, was not exhausted by its exercise thirty years ago. Can there be any question that the decision of the circuit court and of this court in the Lake Front cases would also have been in favor of the railroad company if the lake front south of Sixteenth street had been involved, and it had then appeared that the railroad company had filled in or was about to fill in or complete a space very much smaller than it had appropriated south of Park Row, between

Twelfth and Sixteenth streets, and that the space was absolutely necessary to the railroad company for an engine house? Would not the title and right of the railroad company have been confirmed as freely and fully as such title was confirmed to the engine house north of Fifteenth street? Indeed, there is far less objection to the filling in now proposed, because it is much less in extent than the reclaiming done in front of Twelfth to Sixteenth streets and the lake front at Twenty-seventh street constitutes no part of any present or contemplated or likely harbor for the accommodation of vessels engaged in the commerce of the lake. The filling in between Twelfth street and the south line of Block 21, involved in the Lake Front cases, was from 40 to 330 feet in width —on the average 224.24 feet—covering 12.87 acres exclusive of the piers which extended still further out into the lake 980 feet from the exterior line of filling in; and the depth of water at such line varied from zero to 10.6 feet, the average depth being 8.15 feet. The filling in now proposed is wholly within a breakwater or bulkhead constructed in 1882 in the shallow waters of Lake Michigan extending a short distance easterly from the present shore, and the space to be reclaimed is only four acres.

In the decision at circuit in the Lake Front cases Mr. Justice Harlan and Blodgett, J., distinctly recognized that the charter of the railroad company had conferred upon it a grant of power to enter upon the submerged lands of Lake Michigan. Thus, Mr. Justice Harlan said (33 Fed. Rep. 756):

> "Besides, the state—which, from the time of her admission into the Union, owned the bed of the lake thus occupied, and could lawfully permit it to be occupied for purposes not inconsistent with the public rights of navigation—had expressly

authorized the railroad company to enter upon, take possession of, and use any lands, waters, or materials belonging to her for the location of its depots, station grounds, turn-outs, engine-houses, shops, and other buildings that were necessary 'for the construction, completing, altering, maintaining, preserving, and complete operation of said road,' and *that did not interrupt navigation*. It is true that this power, in respect to lands, waters, and materials belonging to the state, within the corporate limits of a city, could not have been exerted by the company, under its charter, unless such city, by its common council, consented to the location of the road within its limits. But when such consent was given by the city of Chicago, upon the conditions specified in the ordinance of 1852,—conditions which it could lawfully impose,—the right of the railroad company, so far as the State and city were concerned, to fill in the lake to the extent prescribed by that ordinance, and to use the ground thereby made, was placed beyond question. *As to the structures erected by the company east of the exterior line designated by the ordinance of 1852, those built in 1867 may be justified*—apart from the confirmatory clauses of the act of 1869—*under the power expressly given to enter upon, take possession of, and use* (*provided navigation was not thereby interrupted*) *any lands or waters of the State that were necessary for the complete operation of the road, for the purpose designated in the charter of the company.* * * All that we intend now to decide is that, under the showing made, no basis exists for a decree declaring to be illegal the structures heretofore erected by the company east of the exterior line fixed by the ordinance of 1852; such structures appearing, under the evidence, to have been required by the growing business of the company, and therefore necessary for the 'complete operation of the road'; and it not appearing that such use of the waters of the lake interrupts navigation, or materially obstructs the use of the harbor by those engaged in commerce, or interferes with the plans devised by the United States for the improvement of that harbor. * *

"The right of way was located in the open waters of the lake. The State consented, in the charter of the company, that the bed of the lake might be used by the company for a right of way; provided the city assented to the location of the tracks within its limits. The city gave its consent by the ordinance of 1852. Nothing more is requisite to show that the tracks of the company were legally located on the line designated for a right of way. The use of such ground, in per-

petuity, as a right of way simply, does not violate any right of the State, of the city, or of the United States. *Upon the same grounds,—the power given to the company in its charter to enter upon and use any land or waters belonging to the State for a right of way of a prescribed width, and for the location of depots, and for the purpose of constructing station grounds, turn-outs, buildings, etc., necessary to the complete operation of its road, and the consent of the city, as manifested in the ordinances of 1855 and 1856,*—the occupancy of the two triangular pieces of ground south of Randolph street for the purposes of right of way must be sustained as legal. It would be waste of time to set out the evidence showing that these two pieces of ground are essential to the operation of the road."

As to the charter and the power it conferred, Blodgett, J. (dissenting opinion), said (p. 777):

"The charter of the company granted it the right to enter upon, take possession of, and use all and singular any lands, streams, and materials of every kind necessary for the location, construction, and maintenance of its road, with stations, turn-outs, side tracks, depots, shops, etc.; and all such lands, waters, materials, and privileges belonging to the State were granted to said corporation for said purposes. And under this grant the railroad company had the right to take and use this strip of submerged land, subject only to the consent of the city of Chicago. The city gave such consent by its ordinance of June 14, 1852; so that at that time the fee of this strip was in this State, subject to the right of use for railroad purposes granted to the railroad company."

In reviewing these opinions and affirming the judgment upon these points, Mr. Justice Field said (146 U. S. at p. 444):

"It is sufficient to say that when this suit was commenced it had reclaimed from the waters of the lake a tract, two hundred feet in width. * * Its works in no respect interfered with any useful freedom in the use of the waters of the lake for commerce, foreign, interstate or domestic. *They were constructed under the authority of the law* by the requirement of the city as a condition of its consent that the company might locate its road within its limits, and cannot be regarded as such an encroachment upon the domain of the State as to require the interposition of the court for their removal or for any restraint in their use."

In view of these decisions, it cannot be doubted that the construction of the charter now contended for is that adopted and approved in the Lake Front cases, and that this former litigation, far from barring the railroad company's present claim, fully sustains it. The bulkhead or breakwater in front of the property now in question had been constructed when the Lake Front cases were commenced, and it may fairly be said that, if it had constituted an encroachment or an unlawful structure, either the State in its information, or the city of Chicago in its cross-bill would then have challenged the right of the railroad company to maintain it; but neither saw any objection to its maintenance or continuance. If it had been regarded as a purpresture or an unlawful encroachment, it would undoubtedly have been included in the suit and its abatement sought. As this was not done, and as the existing encroachment was not condemned or enjoined, it is proper to insist that the former decision adjudged that it was a lawful structure, duly constructed under the grant of power contained in the charter; and if the Lake Front cases involved this property, then it must follow that the decision was in the railroad company's favor, for the injunction did not restrain any act in respect of it. Indeed, it is practically admitted by the city that this breakwater or bulkhead is a lawful structure, for the answer states that (p. 36): "This defendant further says that it disclaims all intention or design of interfering with the repair or reconstruction of the breakwater at the point named in said bill of complaint;" that is to say, along the line marked *a*, *b*, *c*, *d* (p. 19). The only question, therefore, in the case now before the court is as to the right of the railroad company under its charter to fill in this small parcel of submerged land wholly

enclosed by the bulkhead of 1882 and to use the reclaimed land for an engine house, the necessity for which has not been challenged.

CONCLUSIONS.

For the reasons above discussed, it is submitted that under the true construction of the charter of February 10, 1851, the right to enter upon the submerged lands of Lake Michigan belonging to the State was granted to the Illinois Central Railroad Company; that this right is limited to parcels reasonably necessary for railroad purposes; that it must be exercised in subordination to the public right of navigation; that the construction of an engine house at or about the locality selected is necessary for the due operation of the railroad company's business; and that as the filling in of the parcel in question, situated at Twenty-seventh street in the city of Chicago, in front of the land which the railroad company owns in fee, will not impair navigation, the railroad company has the right to do so within the fair import of its charter grant. If these conclusions are sound, it will follow that the judgment below must be reversed.

Washington, D. C., October Term, 1899.

WILLIAM D. GUTHRIE,
For plaintiff in error.

BENJAMIN F. AYER,
JAMES FENTRESS,
Of counsel.

APPENDIX.

Act of 1851.

An Act to Incorporate the Illinois Central Railroad company. (Approved February 10, 1851.)

Whereas, in the judgment of this general assembly, the object of incorporating the Central Railroad company cannot be attained under general laws; therefore,

Section 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly*, That Robert Schuyler, George Griswold, Gouverneur Morris, Franklin Haven, David A. Neal, Robert Rantoul, junior, Jonathan Sturges, George W. Ludlow,[1] John F. A. Sandford, Henry Grinnell, William H. Aspinwall, Leroy Wiley,[2] and Joseph W. Alsop, and all such persons as shall hereafter become stockholders in the company hereby incorporated, shall be a body politic and corporate by the name and style of the "Illinois Central Railroad company," and under that name and style shall be capable of suing and being sued, impleading and being impleaded, defending and being defended against, in law and equity, in all courts and places whatsoever, in like manner and as fully as natural persons; may make and use a common seal, and alter or renew the same at pleasure; and by their said corporate name and style, shall be capable, in law, of contracting and being contracted with, shall be and are hereby invested with all the powers, privileges, immunities and franchises, and of acquiring, by purchase or otherwise, and of holding and conveying, real and personal estate, which may be needful to carry into effect fully the purposes and objects of this act.

Sec. 2. The said corporation is hereby authorized and empowered to survey, locate, construct, complete, alter, maintain and operate a railroad, with one or more tracks, or lines of rails, from the southern terminus of the Illinois and Michigan canal, to a point at the city of Cairo, with a branch of the same to the city of Chicago, on Lake Michigan; and also a branch, via the city of Galena, to a point on the Mississippi River, opposite the town of Dubuque, in the state of Iowa.

Sec. 3. The said corporation shall have right of way upon, and may appropriate to its sole use and control, for the purposes contemplated herein, land, not exceeding two hundred feet in width through its entire length; may enter upon and take possession of and use all and singular any lands, streams and materials of every kind, for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turn-outs, engine houses, shops and other buildings necessary for the construction, completing,

[1] Thomas W. Ludlow, of New York.
[2] Leroy M. Wiley, of New York.

altering, maintaining, preserving and complete operation of said road. All such lands, waters, materials and privileges belonging to the state, are hereby granted to said corporation for said purposes; but when owned or belonging to any person, company or corporation, and cannot be obtained by voluntary grant or release, the same may be taken and paid for, if any damages are awarded, in the manner provided in "An act to provide for a general system of railroad incorporations," approved November fifth, one thousand eight hundred and forty-nine; and the final decision or award shall vest in the corporation hereby created all the rights, franchises and immunities in said act contemplated and provided: *Provided*, that the appeal allowed by the provisions of the aforesaid act, approved the 5th of November, one thousand eight hundred and forty-nine, shall not affect the possession, by such company, of the land appraised, and when the appeal is made by others than the company, the same shall not be allowed, except on a stipulation of the party appealing that the said company may enter upon and use the lands described in the petition, for the uses and purposes in said petition set forth, upon said company giving bond and security, to be approved by the clerk of said court, that they will pay all costs and damages that may be awarded against said company, on the hearing of said appeal: *Provided*, that nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of said streams.

SEC. 4. The capital stock of said corporation shall be one million of dollars, which may be increased, from time to time, to any sum not exceeding the entire amount expended on account of said road, divided into shares of one hundred dollars each, which shall be deemed personal property, and may be issued and transferred in such manner and at such places as may be ordered and provided by the board of directors, who shall have power to require the payment of sums subscribed by stockholders, in such manner and on such terms as they may deem proper; and on refusal or neglect on the part of stockholders, or any of them, to make payment, on the requisition of the board of directors, the shares of such delinquents may, after thirty days' public notice, be sold at public auction, under such rules as said board of directors may adopt—the surplus money, if any remains, after deducting the payments due with the interest and the necessary costs of sale, to be paid to such delinquent stockholders. The board of directors hereby appointed shall cause books to be opened for subscriptions to said stock in such manner and at such time and places as they shall direct.

SEC. 5. All the corporate powers of said company shall be vested in and be exercised by a board of directors, and such officers and agents as they shall appoint. The board of directors shall consist of not less than twelve stockholders—three of whom shall be chosen every year by the stockholders—each share having one vote, to be given in person or by proxy—and

the governor of the state of Illinois, who shall be a director *ex-officio*, perpetually, voting in person or by proxy; each director successively elected to continue in office until his successor is elected and qualified. Vacancies in the board may be filled by a vote of two thirds of the directors remaining; such appointees to continue in office until the next regular election of directors; but no person shall be so elected who shall not have been openly nominated at a meeting of the directors, at least one week before the time appointed for such election. Other officers, agents and servants, whether members of the board or otherwise, may be appointed, employed, paid and dismissed, under such rules and regulations as the board of directors may from time to time adopt.

SEC. 6. The following-named persons shall constitute the first board of directors, to wit: Robert Schuyler, George Griswold, Gouverneur Morris, Franklin Haven, David A. Neal, Robert Rantoul, jr., Jonathan Sturges, George W. Ludlow, John F. A. Sandford, Henry Grinnell, Joseph W. Alsop, Leroy Wiley, with the governor of the state of Illinois, for the time being, whose powers shall commence and be in full force from and after the day this act shall be accepted in the manner herein provided.

SEC. 7. The president and directors, for the time being, are hereby authorized and empowered, by themselves, their officers or agents, to execute all the powers herein granted, for the purpose of surveying, locating, constructing, completing, altering, maintaining, and operating said road and branches; and for the transportation upon the same of persons, goods, wares and merchandise, with all such powers and authority for the control and management of the affairs of said company, as may be necessary and proper to carry into full and complete effect the meaning and intent of this act.

SEC. 8. The said company shall have power to make, ordain and establish all such by-laws, rules and regulations as may be deemed expedient and necessary to fulfill the purposes and carry into effect the provisions of this act, and for the well ordering, regulating and securing the affairs, business and interests of the company: *Provided*, that the same be not repugnant to the constitution and laws of the United States, or of this state, or repugnant to this act. The board of directors shall have power to establish such rates of toll for the conveyance of persons and property upon the same as they shall, from time to time, by their by-laws, direct and determine, and to levy and collect the same for the use of the said company. The transportation of persons and property, the width of track, the construction of wheels, the form and size of cars, the weight of loads, and all other matters and things respecting the use of said road, and the conveyance of passengers and property, shall be in conformity to such rules and regulations as said board of directors shall from time to time determine. Nothing in this act contained shall authorize said corporation to make a

location of their track within any city without the consent of the common council of said city.

SEC. 9. If any person shall carelessly, wilfully, maliciously, or wantonly delay, hinder, or obstruct the passage of any carriage on said road or branches, or shall place, or cause to be placed, any material thereon, or in any way trespass upon, spoil, injure, or destroy said road or branches, or any part thereof, or anything belonging or pertaining thereto, or employed or used in connection with its location, survey, construction, or management, all persons committing or aiding and abetting in the commission of such trespass or offense, shall forfeit and pay to the said company treble such damages as shall be proved before any court of competent jurisdiction; and further, such offenders shall be liable to indictment in the county within whose jurisdiction the offense may be committed, and to pay a fine of not less than thirty nor more than one hundred dollars, to the use of the people of the state of Illinois, or may be imprisoned in the penitentiary for a term not exceeding five years, in the discretion of the court before whom the same shall be tried.

SEC. 10. Said corporation may construct their said road and branches over or across any stream of water, water course, road, highway, railroad or canal, which the route of its road shall intersect, but the corporation shall restore the stream or water course, road or highway, thus intersected, to its former state, or in a sufficient manner not to have impaired its usefulness. Whenever the track of said railroad shall cross a road or highway, such road or highway may be carried under or over said track, as may be found most expedient; and in case where an embankment or cutting shall make a change in the line of such road or highway desirable, with a view to a more easy ascent or descent, the said company may take such additional lands for the construction of such roads or highway as may be deemed requisite by said corporation, unless the lands so taken shall be purchased, or voluntarily given for the purposes aforesaid. Compensation therefor shall be ascertained in the manner in this act provided, as nearly as may be, and duly made by said corporation to the owners and persons interested in such lands. The same when so taken or compensation made, to become a part of such intersecting road or highway, in such manner and by such tenure as the adjacent parts of the same highway may be held for highway purposes.

SEC. 11. And when the route of the said road, or either of its branches, as provided in this act, shall intersect, cross, or connect with, or run along or upon the line of any other railroad now constructing, or now in process of construction, by any other company, the company to be formed under this act shall join with such other company in making all necessary turn-outs, sidelings and switches, and other conveniences necessary to further the objects of such connection; and when the route of any other company shall be occupied as aforesaid, just compensation shall be

made to such other company for all expenditures made by them in the location of such road; and all railroads so constructed, or now in process of construction, intersected as aforesaid and connections made with the roads authorized to be built by this act, shall be made, and facilities in the transhipment of freight and passengers, and interchange of cars afforded by each, over the respective roads, upon fair and equitable terms--and in case the said companies cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the transhipment of freight and passengers, and interchange of cars, the same shall be ascertained and determined by three commissioners, one to be chosen by each of said companies, and the two so chosen to choose a third, and, in case they cannot agree upon the choice of a third person, he shall be appointed by the judge of the district court of the United States for the district of Illinois; and the decision of the three, when so chosen, shall be final: *Provided*, that this corporation shall not take and run on the road or line of any such company which is now being constructed without the consent and agreement of the company whose road or line is proposed so to be used.

SEC. 12. Every conductor, baggage master, engineer, brakeman, or other servant of said corporation employed in a passenger train, or at stations for passengers, shall wear upon his hat or cap a badge which shall indicate his office, the initial letters or style of the corporation. No conductor or collector without such badge shall demand or be entitled to receive from any passenger any fare, toll or ticket, or exercise any of the powers of his office, and no other of said officers or servants, without such badge, shall have any authority to meddle or interfere with any passenger, his baggage or property. In forming passenger trains, baggage, or freight, or merchandise, or lumber cars shall not be placed in rear of passenger cars; and if they, or any of them, shall be so placed, and any accident shall happen to life or limb, the officer or agent who so directed or knowingly suffered such arrangement, and the conductor or engineer of the train, shall each and all be held guilty of a misdemeanor, and be punished accordingly.

SEC. 13. A bell of at least thirty pounds weight, or a steam whistle, shall be placed on each locomotive engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the said road shall cross any road or street, and be kept ringing or whistling at intervals until it shall have crossed said road or street, under a penalty of fifty dollars for every neglect, to be paid by said corporation, one half thereof to go to the informer, and the other half to the state, and to be liable for all damages which shall be sustained by any person by reason of such neglect. Said corporation shall cause boards to be placed, well supported by posts or otherwise, and constantly maintained across each public road or street where the same is crossed by the railroad, on such elevation as not

to obstruct the travel, and to be easily seen by travelers, and on each side of said board shall be painted in capital letters, of at least the size of nine inches each, the words: "*Railroad Crossing! Look out for the cars.*" But this provision shall not apply to streets or cities, or villages, unless the corporation be required to put up such boards by the officers having charge of such streets.

SEC. 14. Said corporation shall, within a reasonable time after said road and branches shall have been located, cause to be made a map and profile thereof, and of the land taken and obtained for the use of such road and branches, and file the same in the office of the secretary of state, and also like maps of the parts thereof located in the different counties through which the same may pass, and cause the same to be recorded in the office for recording deeds in the county in which said parts of said road and branches shall lie.

SEC. 15. For the purpose of securing the construction of said road and branches, the right of way, and all the lands which may be selected along the lines of said road and branches, within this state, under the grant made by the government of the United States to the state of Illinois, by virtue of "An act granting the right of way, and making a grant of land to the states of Illinois, Mississippi and Alabama, in aid of the construction of a railroad from Chicago to Mobile," passed September twentieth (20,) eighteen hundred and fifty (1850;) and also the right of way which the state of Illinois has heretofore obtained along and on the line of said railroad and branches, as heretofore located and surveyed, for the uses of the same, as well as the lot of ground obtained by the state within the city of Cairo, for a depot, and all the grading, embankments, excavations, surveys, work, materials, personal property, profiles, plats, and papers, constructed, procured, furnished, and done by or in behalf of the state of Illinois, for or on account of said road and branches, also the right of way over and through lands owned by the state, are hereby ceded and granted to said corporation, for the only and sole purpose of surveying, locating, constructing, completing, altering, maintaining and operating said road and branches, as in this act provided, and in the manner following—that is to say: Immediately upon the organization of said company, and the presentation to the governor of the state of Illinois of a certificate, signed by the corporators hereinbefore named, and duly acknowledged, accepting of this act of incorporation, and certifying to the due organization of said corporation—to the subscription to the capital stock thereof by the corporators hereinbefore named and their associates, of the sum of one million of dollars, and the *bona fide* payment of twenty per cent. thereon to the treasurer of said company, verified by the affidavits of the president and treasurer of said company; (which said certificate shall be filed in the office of the secretary of state,) and after three hundred

thousand dollars of registered canal bonds, or funded internal improvement bonds of the state of Illinois, or two hundred thousand dollars in specie, or two hundred thousand dollars of six per cent. United States stock, shall have been by the said corporation deposited with the treasurer of the state of Illinois, which shall be safely preserved and kept in the treasury of said state, upon the faith of the same, to be returned to or paid over to the said corporation, upon the full completion and operation of fifty miles of said railroad, by the said corporation, according to the provisions of their said charter, the said governor of the state of Illinois shall, in his official capacity, and in behalf of the state of Illinois, and under the great seal thereof, execute and deliver to the said company a deed, in fee simple, of all said lands granted by the government of the United States, under the act of congress aforesaid, said depot lot at Cairo, right of way, grading, embankment, excavations, surveys, work, materials, profiles, plats and papers, hereinafter described and set forth, or in any way appertaining to said road and branches: *Provided*, that said company shall simultaneously with the execution of said deed by said governor, execute a deed of trust to the persons and for the purposes hereinafter named and expressed: *And provided, further*, that the deed in fee simple, to be executed by the governor as aforesaid, shall recite, at full length, the act of congress aforesaid, this act and the deed of trust aforesaid. Said deed of trust shall be executed to Morris Ketchum, John Moore and Samuel D. Lockwood, as trustee, and shall include and convey to said trustees and their successors everything included and conveyed in and by said deed in fee simple, and in addition thereto the railroad or railroads which may be built upon or along said track or tracks, line or lines, and materials for the construction thereof, with all and singular the buildings, shops, engine houses, turn-outs, stations and real estate, of every nature and description, belonging or to belong to or in anywise appertaining or to appertain to said road and branches, for the uses, trusts and purposes following, that is to say:

First. To secure and guarantee to the state of Illinois the first and prior lien on everything conveyed by said deed of trust, of every name, character and description, for security, as follows: *Firstly*—The constructing, completing and furnishing said road and branches, in the manner and time and upon conditions in this act provided. *Secondly*—For the faithful application of all money or property arising from the sale of lands, or obtained upon the faith of the same, as hereafter authorized, to the constructing, completing, equipping and furnishing said road and branches, in accordance with the terms of this act and said act of congress. *Thirdly*—The indemnification of the state of Illinois against all and every claim of the United States Government, for proceeds of sale of lands made by said company, under the provisions of this act, in the event said roads and branches shall not be completed, as required by the act of congress above referred to. *Fourthly*—

The lien hereby created shall take and have precedence of all demands, incumbrances, mortgages, bonds, judgments and decrees, against said corporation, or said property, except so far as the absolute power of selling said lands, or any portion thereof, is herein provided for: *Provided*, that in case fifty miles of the said road shall not be constructed, according to the provisions of this act, within two years, from and after the date of the organization of the company, under the same, the bonds or money herein provided to be deposited with the treasurer of the state of Illinois, shall become forfeited to and become the property of the said state, subject to the disposition of the legislature thereof.

Second. That on its organization said company may enter upon, take and receive possession of the said tracks or lines, for the purpose of surveying, locating, working and constructing said road and branches, with the right of way, land, grading, embankments, excavations, surveys, works, materials, property, profiles, plats and papers aforesaid, to be occupied, used, and employed for the purposes contemplated by this act, under whosesoever control the same may be.

Third. That said company shall proceed to locate, survey and lay out, construct and complete said road and branches, through the entire length thereof—the main trunk thereof, or central line, to run from the city of Cairo to the southern termination of the Illinois and Michigan canal, passing not more than five miles from the north-east corner of township twenty-one north, range two east of the third principal meridian, and nowhere departing more than seventeen miles from a straight line between said city of Cairo and said southern termination of said canal, with a branch running from the last mentioned point, upon the most eligible route, to the city of Galena; thence to a point on the Mississippi river opposite the city of Dubuque, in the state of Iowa; with a branch also diverging from the main track at a point not north of the parallel of thirty-nine and a half degrees north latitude, and running on the most eligible route into the city of Chicago, on Lake Michigan. That the central road or main track shall be completed, with at least one line of rails, or single track, with the necessary turn-outs, stations, equipments and furnishings, within four years from the date of the execution of said deed of trust, and the branches within six years from the said date. Said roads to be made equal, in all respects, to the road leading from Boston to Albany, usually known as the Great Western Railway, with such improvements as experience shall have shown to be expedient—the central or main line to be first commenced, and be continued to completion.

Fourth. A portion of said lands so conveyed to said trustees, not exceeding one fourth part thereof in value, to be designated by said company, shall be held by said trustees, free from all incumbrances, for purposes of sale, from time to time, on the requisition of said company, for the

purpose of raising funds for the payment of interest on loans, in case of deficiency from other sources, and for such expenditures as the exigencies of the business of the company may require: *Provided*, that no portion of said fourth part of said lands shall be sold until said road and branches shall have been surveyed and located, and the work actually commenced on the main road: *Provided, further*, that no portion of said lands so held by the said trustees, free from all incumbrance for said purposes, shall be sold or offered for sale until the said trustees shall be satisfied that a sum of money has been actually expended upon the construction of a section of at least fifty miles of said road, adjacent to said lands, equal in amount to the sum of money to be raised from the sale of such portion of said lands, or until a section of at least fifty miles of said road, adjacent to said lands, shall have been completed—when the lands on said section will be sold—and so on till the said road and branches shall be completed.

Fifth. For the purpose of raising funds from time to time, for the construction and completion of said road and branches, and the purchase of iron and other materials to be used thereon, said company may issue its bonds, countersigned by the said trustees, in sums of not less than five hundred nor more than one thousand dollars each, at rates of interest not higher than seven per cent. per annum, payable semi-annually; the principal of said bonds payable in the year one thousand eight hundred and seventy-five, or sooner, at the pleasure of the company, at such place as it shall designate. The payment of said bonds shall be secured by the deed of trust aforesaid, of said lands, roads, and materials, as hereinbefore provided; subject, nevertheless, to the prior lien of the state upon said lands and property hereinbefore provided for; which said prior lien shall be referred to and recited in said bonds, so to be issued by said company: *Provided*, that the faith of the state is in no wise pledged for the redemption of said bonds to any extent.

SEC. 16. When the said company shall have completed, and put in running order, fifty miles of said road, the said trustees, on the requisition of said company, may proceed to sell the lands lying along and adjacent to such section so completed, (and not reserved free from all incumbrance as aforesaid,) and in such manner as the company may direct. Said lands shall be sold for cash in hand, or the bonds of said company at par. All bonds received on such sales shall be cancelled by said trustees and delivered to said company. The trustees shall invest all money received on such sales in the bonds of the company, which shall be, in like manner, canceled and returned. On canceling said bonds, and before returning them to the company, said trustees shall make a brief memorandum on each bond, specifying for or on what particular tract or tracts of land the same was received. On making such sales, and receiving the price of such lands in money or bonds as aforesaid, said trustees shall convey such tracts, by an

absolute title in *fee simple*, to the purchasers; which conveyance shall operate as a release or an acquittance of the particular tract or tracts so sold, from all liability or incumbrance on account of said bonds, so specified in the preceding section, so as to vest in the purchasers a complete and indefeasible title. Before any sales shall be made of any of said lands, the said trustees shall make a complete record, describing each and every tract of land selected under said act of congress, a copy of which record shall be filed in the office of the auditor of this state, and as sales of land are made, as provided herein, from time to time, the said trustees shall make and keep a record as aforesaid of every and each tract of land so sold, together with the name of the person to whom, and the price for which the same was sold. A copy of which record of sales shall be filed in said auditor's office semi-annually.

SEC. 17. The trustees shall not, at any time during the construction of said road and branches, sell or dispose of lands to an amount exceeding the sum which shall then have actually been expended upon the said work, but may, at the request of the company, sell as the work progresses, so as to meet expenditures actually made on the sections of road completed, as far as the receipts from said sales may go toward their liquidation. And all lands remaining unsold at the expiration of ten years after the completion of said road and branches, shall be offered at public sale, annually, until the whole is disposed of, and the avails applied to the payment of the outstanding bonds of the company as aforesaid; or, if no such bonds be outstanding, said avails shall be paid to said company.

SEC. 18. In consideration of the grants, privileges and franchises herein conferred upon said company for the purposes aforesaid, the said company shall, on the first Mondays of December and June, in each year, pay into the treasury of the state of Illinois, five per centum on the gross or total proceeds, receipts, or income derived from said road and branches, for the six months then next preceding. The first payment of such per-centage on the main trunk of said road to commence four years from the date of said deed of trust, and on the branches, six years from the date aforesaid, unless said road and branches are sooner completed, then from the date of completion. And for the purpose of ascertaining the proceeds, receipts or income aforesaid, an accurate account shall be kept by said company, a copy whereof shall be furnished to the governor of the state of Illinois; the truth of which account shall be verified by the affidavits of the treasurer and secretary of such company. And for the purpose of verifying and ascertaining the accuracy of such account, full power is hereby vested in the governor of the state of Illinois, or any other person by law appointed, to examine the books and papers of said corporation, and to examine, under oath, the officers, agents and employees of said company, and other persons. And if any person so examined by the governor, or other authority, shall,

knowingly and wilfully, swear falsely, or if the officers making such affidavits shall, knowingly and wilfully, swear falsely, every such person shall be subject to the pains and penalties of perjury.

SEC. 19. The selection of lands provided for in the act of congress making the grant hereinbefore specified, shall be made by said company, or such agents as it may designate, under the appointment of the governor of this state, subject to the approval in said act specified. Said selection, as well as the survey, location, and completion of said road and branches, and the compensation of such trustees, shall be at the cost and charge of said company, without charge of any kind upon the treasury of the state of Illinois. Said road and branches to be free for the use of the United States, and to be employed by the post office department, as provided in said act of congress.

SEC. 20. In case of the death, resignation, removal, or inability to act, of either or all of said trustees, the vacancy, or vacancies shall be filled by the governor of the state of Illinois and said company, alternately; the governor filling the first vacancy that may occur.

SEC. 21. The corporate authorities of any city or cities on the line of said road or branches, or at either terminus thereof, or any owner or owners of property in any such city, or any association of citizens duly authorized by any such corporation, shall have power to lay down or construct a track or railroad along any of the streets of any such cities, for the purpose of conveying property to and from said railroad, which may be consigned to any of the warehousemen, in any of said cities, that said track or railroad (under the direction of said company,) may intersect the track of said railroad company at or near the main depot in said cities, respectively; and said company shall, at all times, permit the owners or consignees of property in such cities to take the cars containing the property to them consigned, to their respective warehouses upon said track: *Provided*, that any car so taken shall be returned without any unnecessary delay: *And provided, further*, that whenever it shall be necessary, for the convenience of the public, or persons receiving or sending property by said railroad, the said company shall permit side tracks to intersect their main road at any depot on or along the line of said road; and that such persons shall be entitled to have any property taken from such side tracks, under the directions and regulations of said company, without unreasonable delay; and for the non-performance by said company of any act of this proviso required to be done, said company shall forfeit and pay to the party aggrieved the sum of fifty dollars, in each case, to be recovered in an action of debt, before any justice of the peace, or any court having jurisdiction thereof.

SEC. 22. The lands selected under said act of congress, and hereby authorized to be conveyed, shall be exempt from all taxation under the laws of this state, until sold and conveyed by said corporation or trustees, and

the other stock, property and effects of said company shall be in like manner exempt from taxation for the term of six years from the passage of this act. After the expiration of said six years, the stock, property and assets belonging to said company shall be listed by the president, secretary or other officer, with the auditor of state, and an annual tax for state purposes shall be assessed by the auditor upon all property and assets of every name, kind and description belonging to said corporation. Whenever the taxes levied for state purposes shall exceed three-fourths of one per centum per annum, such excess shall be deducted from the gross proceeds or income herein required to be paid by said corporation to the state, and the said corporation is hereby exempted from all taxation of every kind, except as herein provided for. The revenue arising from said taxation, and the said five per cent. of gross or total proceeds, receipts or income aforesaid, shall be paid into the state treasury in money, and applied to the payment of interest-paying state indebtedness, until the extinction thereof: *Provided*, In case the five per cent. provided to be paid into the state treasury, and the state taxes to be paid by the corporation, do not amount to seven per cent. of the gross or total proceeds, receipts or income, then the said company shall pay into the state treasury the difference, so as to make the whole amount paid equal at least to seven per cent. of the gross receipts of said corporation.

SEC. 23. This act, and all grants herein contained, shall cease and be void, unless accepted by said company within sixty day after the passage of this act; and immediately on such acceptance, made in the manner above provided, the deed in fee simple, and the deed of trust aforesaid, shall be made as above provided. All the grants herein contained shall cease and be void unless said road and branches be surveyed and located, and work on the main trunk actually begun before the first day of January, 1852.

SEC. 24. The state shall have a prior lien upon said road and branches, and all the appurtenances and stock thereof, for all penalties, taxes and dues, which may accrue to the state from said corporation, as herein provided; which lien of the state shall take precedence of all demands, judgments or decrees against said corporation.

SEC. 25. That each and every person, who, on the twentieth day of September, one thousand eight hundred and fifty, was the owner of any improvements made previous to that date, on any lot of land conveyed to the said company, and who became such owner with a view to a residence on, or occupation of such lot of land for agricultural purposes, shall have the right to purchase, at not exceeding two dollars and fifty cents per acre, a quantity of the lot so owned, to be bounded by the legal subdivisions, not exceeding one quarter section, to consist of the quarter-quarter, half-quarter, and quarter section, which will include the improvement aforesaid: *Provided*, that any person claiming the right to purchase, under the provisions of this

act, shall, within three months from the date of selecting the lands, file in the clerk's office of the circuit court of the county in which the land claimed is situated, a notice to the said trustees and corporation of his, her or their claims, describing the land by its numbers, accompanied with an affidavit stating the date and object of the improvement, the time and manner when and how he, she or they, became the owner thereof, and also the affidavits of at least two residents of the county, proving the facts in relation to such claim: *And provided, further*, that the right of way upon and across any lot of land sold under the provisions of this section, not exceeding two hundred feet in width, shall be reserved and retained for the passage of the road, as the same may be located and constructed, and any person claiming the right to purchase as aforesaid, shall, within twelve months from the date of commencing the work on the road within the county in which the land is situated, pay the said trustees or the corporation the consideration money for the land claimed; which payment shall entitle him, her or them, to a deed conveying an estate in fee; but in case of failure to make such payment, the right to make the purchase shall cease. When two or more persons claim the right to purchase the same lot of land, and file the proof of ownership as herein required, the person proving the first residence by himself, or those under whom he claims the improvement, shall have the right to make the purchase, but no sale or conveyance of any lot of land under the provisions of this section, shall affect the rights or equities of parties claiming the same, as between each other.

SEC. 26. In case the persons incorporated by this act shall fail or neglect to accept the provisions of the same, and comply with its conditions within the time, and in the manner herein prescribed, then the same may be accepted by any other company which shall be approved of by the governor, auditor and treasurer of this state; who, upon complying with the terms and conditions of this act, shall be vested with all the rights, powers and immunities conferred upon the corporators herein named, and shall be subject to all the liabilities in the said act set forth, in as full, ample and complete a manner as if their names were inserted as corporators in this act.

SEC. 27. This act shall be deemed a public act, and shall be favorably construed for all purposes therein expressed, and declared, in all courts and places whatsoever, and shall be in force from and after its passage.

ACT OF 1861.

AN ACT to amend "An act to amend the act entitled, 'an act to reduce the law incorporating the city of Chicago and the several acts amendatory thereof into one act, and to amend the same,' approved February 14, 1851, and to reduce the several acts amendatory of said act into one act, and to amend the act entitled 'an act to incorporate the Chicago City Hydraulic Company,' approved February 15, 1851, and to reduce

the several acts amendatory of said last mentioned acts into one act, and to amend the act entitled, 'an act to incorporate a board of Sewerage Commissioners for the City of Chicago,'" approved February 14, 1855. (Approved February 18, 1861.)

* * * * * *

SEC. 64. No encroachment shall be made upon the land or water west of a line mentioned in the second section of an ordinance concerning the Illinois Central Railroad (which line is "not less than four hundred feet east from the west line of Michigan avenue, and parallel thereto,") by any railroad company; nor shall any cars, locomotives, engines, machines, or other things belonging to any railroad or transportation company, be permitted to occupy the same, nor shall any cars or machinery be left standing upon said track fronting any part of Michigan avenue; nor shall the city council ever allow any encroachments west of the line above described. And any person being the owner of or interested in any lot or part of a lot fronting on Michigan avenue, shall have the right to enjoin said company, and all other persons and corporations from any violations of the provisions of this section or of said ordinance, and, by bill or petition, in chancery, in his or their own name, or otherwise, enforce the provisions of said ordinance and of this section, and recover such damages, for any such encroachments or violation as the court shall deem just—the state of Illinois, by its canal commissioners, having declared that the public grounds east of said lots should forever remain open and vacant. Neither the common council of the city of Chicago, nor any other authority, shall ever have the power to permit encroachments thereon, without the assent of all the persons owning lots or land on said street or avenue.

ACT OF 1863.

AN ACT to reduce the Charter of the City of Chicago and the several acts amendatory thereof into one act, and to revise the same. (Approved February 13, 1863.)

* * * * * *

CHAP. VII., SEC. 43. (This section is identical with section 64 of the act amendatory of city charter, approved February 18, 1861, *supra*, except that after the words "nor shall any cars or machinery be left standing upon said track fronting any part of Michigan avenue," the words, "south of Madison street," are added.)

ACT OF 1869.

An Act in relation to a portion of the submerged lands and lake park grounds lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of the city of Chicago. (Passed over objections April 16, 1869.)

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, that all right, title and interest of the State of Illinois in and to so much of fractional section fifteen (15), township thirty-nine (39), range fourteen (14), east of the third (3d) principal meridian, in the city of Chicago, County of Cook, and State of Illinois, as is situated east of Michigan avenue and north of Park Row, and south of the south line of Monroe street, and west of a line running parallel with, and four hundred feet east of, the west line of said Michigan avenue—being a strip of land four hundred feet in width, including said avenue, along the shore of lake Michigan, and partially submerged by the waters of said lake—are hereby granted, in fee, to the said city of Chicago, with full power and authority to sell and convey all of said tract east of said avenue, leaving said avenue ninety (90) feet in width, in such manner and upon such terms as the Common Council of said city may, by ordinance, provide: *Provided*, that no sale or conveyance of said property or any part thereof, shall be valid unless the same be approved by a vote of not less than three-fourths of all the Aldermen elect.

SEC. 2. The proceeds of the sale of any and all of said lands shall be set aside, and shall constitute a fund, to be designated as the "Park Fund" of the said city of Chicago, and said fund shall be equitably distributed, by the Common Council, between the South Division, the West Division, and the North Division of the said city, upon the basis of the assessed value of the taxable real estate of each of said divisions, and shall be applied to the purchase and improvement, in each of said divisions, or in the vicinity thereof, of a public park, or parks, and for no other purpose whatsoever.

SEC. 3. The right of the Illinois Central Railroad Company, under the grant from the State in its charter, which said grant constitutes a part of the consideration for which the said company pays to the State at least seven per cent. of its gross earnings, and under and by virtue of its appropriation, occupancy, use and control, and the riparian ownership incident to such grant, appropriation, occupancy, use and control in and to the lands submerged or otherwise lying east of the said line running parallel with and four hundred feet east of the west line of Michigan avenue, in fractional sections ten (10) and fifteen (15), township and range as aforesaid, is hereby confirmed, and all the right and title of the State of Illinois, in and to the submerged lands constituting the bed of Lake Michigan and lying east of the tracks and breakwater of the Illinois Central Railroad Company, for the distance of one mile, and between the south line of the south pier extended eastwardly, and a line extended eastward from the south line of lot twenty-one, south of and near to the round house and machine shops of said company, in the South Division of the said city of Chicago, are hereby granted, in fee, to the said Illinois Central Railroad Company, its successors and assigns: *Provided*, however, that the fee to said lands shall be held

by said company in perpetuity and that the said company shall not have power to grant, sell or convey the fee to the same, and that all gross receipts from use, profits, leases or otherwise of said lands or the improvements thereon, or that may hereafter be made thereon, shall form a part of the gross proceeds, receipts and income of the said Illinois Central Railroad Company upon which said company shall forever pay into the State Treasury, semi-annually, the per centum provided for in its charter, in accordance with the requirements of said charter: *And Provided, also*, that nothing herein contained shall authorize obstructions to the Chicago harbor, or impair the public right of navigation, nor shall this act be construed to exempt the Illinois Central Railroad Company, its lessees or assigns, from any act of the General Assembly which may be hereafter passed regulating the rates of wharfage and dockage to be charged in said harbor: *And, provided, further*, that any of the lands hereby granted to the Illinois Central Railroad Company, and the improvements now or which may hereafter be on the same, which shall hereafter be leased by said Illinois Central Railroad Company to any person or corporation, or which may hereafter be occupied by any person or corporation other than said Illinois Central Railroad Company, shall not, during the continuance of such leasehold estate, or of such occupancy, be exempt from municipal or other taxation.

SEC. 4. All the right and title of the State of Illinois in and to the lands, submerged or otherwise, lying north of the south line of Monroe street, and south of the south line of Randolph street, and between the east line of Michigan avenue and the track and roadway of the Illinois Central Railroad Company, and constituting parts of fractional sections ten (10) and fifteen (15), in said township thirty-nine (39), as aforesaid, are hereby granted, in fee, to the Illinois Central Railroad Company, the Chicago, Burlington & Quincy Railroad Company, and the Michigan Central Railroad Company, their successors and assigns, for the erection thereon of a passenger depot and for such other purposes as the business of said companies may require: *Provided*, that upon all gross receipts of the Illinois Central Railroad Company, from leases of its interest in said grounds or improvements thereon, or other uses of the same, the per centum provided for in the charter of said company shall forever be paid, in conformity with the requirements of said charter.

SEC. 5. In consideration of the grant to the said Illinois Central, Chicago, Burlington & Quincy, and Michigan Central Railroad companies of the land as aforesaid, said companies are hereby required to pay to said city of Chicago, the sum of eight hundred thousand dollars, to be paid in the following manner, viz: Two hundred thousand dollars within three months from and after the passage of this act, two hundred thousand dollars within six months from and after the passage of this act, two hundred thousand dollars within nine months from and after the passage of this act,

two hundred thousand dollars within twelve months from and after the passage of this act; which said sums shall be placed in the park fund of the said city of Chicago, and shall be distributed in like manner as is hereinbefore provided for the distribution of the other funds which may be obtained by said city from the sale of the lands conveyed to it by this act.

SEC. 6. The Common Council of the said city of Chicago is hereby authorized and empowered to quitclaim and release to the said Illinois Central Railroad Company, the Chicago, Burlington & Quincy Railroad Company, and the Michigan Central Railroad Company any and all claim and interest in and upon any and all of said land north of the south line of Monroe street, as aforesaid, which the said city may have by virtue of any expenditures and improvements thereon, or otherwise; and in case the said Common Council shall neglect or refuse thus to quitclaim and release to the said companies as aforesaid, within four months from and after the passage of this act, then the said companies shall be discharged from all obligation to pay the balance remaining unpaid to said city.

SEC. 7. The grants to the Illinois Central Railroad Company contained in this act are hereby declared to be upon the express condition that said Illinois Central Railroad Company shall perpetually pay into the Treasury of the State of Illinois the per centum on the gross or total proceeds, receipts or income derived from said road and branches stipulated in its charter and also the per centum on the gross receipts of said company reserved in this act.

SEC. 8. This act shall be a public act, and in force from and after its passage.

No. 114.

Brief of Ayer, Guthrie & Fentress for P. E.

Court U. S.
FILED
OCT 26 1899
JAMES H. MCKENNEY,

Filed Oct. 26, 1899.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 114.

ILLINOIS CENTRAL RAILROAD COMPANY, *Plaintiff in Error,*

vs.

THE CITY OF CHICAGO, *Defendant in Error.*

Error to the Supreme Court of the State of Illinois.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

BENJAMIN F. AYER,
For Plaintiff in Error.

WILLIAM D. GUTHRIE,
JAMES FENTRESS,
Of Counsel.

BARNARD & MILLER, PRINT.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 114.

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in Error,
vs.
THE CITY OF CHICAGO,
Defendant in Error.

Error to the Supreme Court of the State of Illinois.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

By an act of Congress approved September 20, 1850 (9 U. S. Stat., 466), the right of way through the public lands was granted to the State of Illinois for the construction of a railroad from the southern terminus of the Illinois and Michigan Canal (at La Salle) to a point at or near the junction of the Ohio and Mississippi rivers, "with a branch of the same to Chicago, on Lake Michigan, and another *via* the town of Galena, in said State, to Dubuque, in the State of Iowa."

A large grant of public lands was made in the act in aid of the construction of the road; and it was provided that the construction of the main line should be commenced at its northern terminus and at its southern terminus simultaneously, and "continued from each of said points until completed, when said branch roads shall be constructed, according to the survey and location thereof." It was also provided, that if the railroad should not be completed within ten years, the State should be bound to pay to the United States the amount which might be received upon the sale of any part of the lands by the State, and the title to the residue should re-invest in the United States.

By an act of the State Legislature, approved February 17, 1851 (Illinois Laws, 1851, pp. 192-3), the above mentioned

act of Congress was accepted, and all conditions expressed in the act were formally "agreed to and made obligatory upon the State of Illinois."

It is a well known historical fact that for a number of years prior to 1850 the construction of a railroad from Cairo to Galena had been considered by the legislature and people of Illinois as an object of great public importance. In February, 1837, an act was passed by the legislature providing for the building of the road by the State, and the sum of $3,500,000 was appropriated for that purpose. The money was to be procured by the sale of State bonds. (Ills. Laws, 1837, p. 121.) Bonds to a large amount were actually issued and sold by the State, and with the moneys thus borrowed the State entered upon the construction of an extensive system of internal improvements. The financial panic which swept over the country in 1837 and 1838 brought these enterprises to an abrupt close. The borrowed money was exhausted and the State was compelled to suspend the payment of interest on the public debt. The bonds of the State were discredited, and it was not until 1850 that the revenues were found to be sufficient to meet the current demands upon the treasury for ordinary State expenses.

The first substantial hope of relief from that depressed condition of the State finances came from the passage of the above mentioned act of Congress. In the annual message of Governor French to the legislature on the sixth of January, 1851, it is said:

> "The very liberal grant of lands by the general government to aid in the construction of great leading public works through the State, has given a new and vigorous impulse to the hopes and expectations of the friends of these enterprises. The immense influence which this magnificent grant, if judiciously managed, may be made to exert upon the present condition and future destiny of the State, can hardly be overrated."

In another paragraph relating to the same subject, the governor goes on to say:

"The prominent object to be kept in view is the completion of the contemplated works; and to render it certain that these shall be undertaken and finished, liberal terms in the disposition of the granted lands must be tendered to those willing to undertake them. * * It is not presumed that the State will engage, in any form, directly, in the enterprise, and that whatever connection she may have with it, if any, will be in an indirect way. * * Keeping in view, then, the important object to be gained, the early construction of the contemplated works, while on guard against mere adventurers, in whose hands the means of construction or the project itself might be endangered, it may be proper to observe that to secure this object, liberal offers should be made to induce capitalists to engage in the enterprise."

The force of these suggestions will be appreciated when it is borne in mind that the proposed railroad was more than 700 miles long, and that for the greater part of its course it would traverse a new and unsettled country. The granted lands, with other lands adjacent, had been in the market for twenty-five years at the minimum government price of a dollar and a quarter an acre, and there were few purchasers. The road would cost many millions of dollars and must be completed within ten years. The State had no money, and its credit was exhausted. The only resource of the State was to create a corporation composed of non-resident capitalists, who had the ability to raise the necessary money and would be willing to assume the risk and undertake the work. The Illinois Central Railroad Company was incorporated for that purpose at that session of the legislature. Provision was made for a large permanent revenue to the State from the earnings of the road. It was provided in the charter that the State should be paid annually, in perpetuity, a sum equal to not less than seven per cent. of the gross earnings of the railway. The direct pecuniary benefit to be derived from this source was expected to be large, and these expectations have been fully realized. The gross sum received by the State out of the earnings of the road down to April 30, 1899, was

$17, 652,930.21. For the six years ending April 30, 1899, these contributions to the revenues of the State amounted to $3,856,929.35, or an average of $642,821.56 per year.

The act to incorporate the Illinois Central Railroad Company, approved February 10, 1851 (Priv. Laws of Ills., 1851, p. 61), confers power (Sec. 2), "to survey, locate, construct, complete, alter, maintain and operate a railroad with one or more tracks or lines of rails, from the southern terminus of the Illinois and Michigan Canal to the City of Cairo, with a branch of the same to the City of Chicago, on Lake Michigan; and also a branch *via* the City of Galena to a point on the Mississippi river opposite the town of Dubuque, in the State of Iowa."

By the seventh section, the president and directors were empowered "to execute all the powers herein granted for the purpose of surveying, locating, constructing, altering, maintaining and operating said road and branches." In the fifteenth section, the company was required (paragraph third) to "proceed to locate, survey and lay out, construct and complete said road and branches, through the entire length thereof"; and it was provided that the Chicago branch should diverge from the main line at a point not farther north than the parallel of 39½ degrees north latitude, and run "on the most eligible route *into the City of Chicago, on Lake Michigan.*" The central road or main line was required to be completed, with at least one track, "with the necessary turn-outs, stations, equipments and furnishings," within four years, and the branches within six years.

By the same section (15), the right of way and all the lands included in the grant made to the State by the aforesaid act of Congress were "ceded and granted to said corporation"; but a paramount lien on the road and branches and all the granted lands was retained by the State to secure the completion of the work within the time prescribed, and to indemnify the State against any and every claim of the United States for proceeds of sale of lands under the provisions of that act, in case the

road and branches should not be completed as required in said act.

The act of incorporation also contained this additional grant:

> "SEC. 3. The said corporation shall have right of way upon, and may appropriate to its sole use and control, for the purposes contemplated herein, land not exceeding two hundred feet in width through its entire length; may enter upon and take possession of and use all and singular, *any lands, streams and materials of every kind*, for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turn-outs, engine-houses, shops and other buildings necessary for the construction, completing, altering, maintaining, preserving and complete operation of said road. All such lands, waters, materials and privileges belonging to the State, are hereby granted to said corporation for said purposes; but when owned or belonging to any person, company or corporation, and cannot be obtained by voluntary grant or release, the same may be taken and paid for, if any damages are awarded, in the manner provided in 'An Act to provide for a general system of railroad corporations,' approved November fifth, one thousand eight hundred and forty-nine."

The eighth section contains this provision:

> "Nothing in this act contained shall authorize said corporation to make a location of their track within any city, without the consent of the Common Council of said city."

The last section of the charter (Sec. 27) declares, that

> "this act shall be deemed a public act, *and shall be favorably construed for all purposes therein expressed and declared in all courts and places whatsoever.*"

The railroad was located within the City of Chicago in 1852 (in accordance with the provisions of a city ordinance), for a short distance, along the shore of Lake Michigan, and for the rest of the way, across the open waters of the lake in front of the shore.

In 1882 the company constructed a breakwater in the shal-

low waters of the lake in front of its own land upon the shore between the foot of 25th street and the foot of 27th street. In 1897 it became necessary to construct an engine-house on a portion of the land between that breakwater and the shore, and to fill in, for that purpose, a part of the inclosed area. The breakwater had been injured by storms and partially destroyed, and in order not to infringe any rule or regulation of the United States affecting navigation, application was made to the Secretary of War for permission to repair and rebuild it. Consent was granted in the following terms:

"WAR DEPARTMENT, WASHINGTON, AUGUST 14, 1897.

"SIR: I have the honor to acknowledge the receipt of your letter of 6th instant, requesting permission to repair certain piers, belonging to your company, in the vicinity of 25th and 27th streets, Chicago, Illinois.

"In reply I beg to inform you that the local engineer officer, to whom your communication was referred, having reported that the proposed work will in no way affect the general navigation of Lake Michigan or of Chicago harbor, the War Department will interpose no objection thereto.

"Very Respectfully,

"G. L. MEIKLEJOHN,

"Acting Secretary of War.

"J. T. HARAHAN, ESQ.,

"2nd Vice-President Illinois Central Railroad Company, Chicago, Illinois."

Preparation was then made by the company for repairing and rebuilding the breakwater and filling in the land needed for the construction of the engine-house, but the company was forcibly prevented by the police force of the city, acting under the orders and direction of the mayor, from going on with the work. The object of the bill filed in this case was to procure an injunction restraining the city, its officers, attorneys and agents, from further preventing or in anywise interfering with the work of completing the breakwater and filling in, reclaiming and using the submerged land inside of that structure for the purpose of constructing an engine-house thereon.

The railroad company asserts that by virtue of the grant made by the State to the company in section 3 of its charter, it had the lawful right to enter upon and take possession of the land in question, belonging to the State, for the purpose that has been mentioned, and that the City of Chicago, which is a governmental agency created by the State for civil or political purposes, has by its forcible interference arbitrarily deprived the company of its property without due process of law, in violation of the fourteenth amendment of the constitution of the United States. It is also alleged that this forcible interference was made under color of a pretended police ordinance of the city, which, in the application made of it, impairs the obligation of the contract between the State and the company contained in the company's charter.

It is not denied by the city that the company seeks to enter upon and take possession of the land in question for a legitimate and necessary purpose; nor is it pretended that the reclamation of the land from the lake would be any impairment of the public right of navigation. The position taken by the city in its answer is, that the railroad company has no right to take possession of any land of the State covered by the waters of the lake, whether shallow or navigable, for any purpose whatever, and it justifies the forcible interference complained of on the ground that it is a municipal corporation organized under an act of the General Assembly of the State of Illinois entitled, "An Act to provide for the incorporation of cities and villages," approved April 10, 1872, in force July 1, 1872, and the several acts amendatory thereof; and that it is thereby "charged with the duty and power of protecting and regulating the harbor and shore of Lake Michigan within its corporate limits, and exercises to that end *the police power of the State of Illinois.*" It is alleged in the answer that "in the exercise of such power this defendant has, through its police power, prevented the said complainant hitherto from filling up the said lake and intruding upon the navigable waters thereof." It is also alleged, that "it is made the duty of the City of Chicago

by its charter to regulate the police of said city, and pass and enforce all necessary police ordinances."

Several ordinances established by the city council, relied upon as a justification of the acts complained of, are set out in the answer, containing provisions to the effect, that the harbor master and assistant harbor masters "shall have all the power and authority of police officers under the laws of the State and the ordinances of the City of Chicago"; that all the waters of the lake within three miles of the shore, between the north and south lines of the city, "shall be a portion of the harbor of the City of Chicago, and shall be subject to the control of the harbor master and to all the rules and regulations" provided by the city council; that no person or persons shall cause any piles, stone, timbers or earth to be driven or placed in the harbor without permission of the commissioner of public works, and that any one violating this provision "shall, on conviction thereof, be fined not less than twenty-five dollars nor more than fifty dollars for the first offense, and not more than seventy-five dollars for each and every subsequent offense."

The case was decided in the State court adversely to the railroad company. It was held that the grant in section 3 of the charter "did not include lands covered by the waters of Lake Michigan"; that the word "lands" in that section meant only dry land, constituting part of the fixed or solid portion of the earth, and (adopting that construction) that the legislature had conferrred no authority upon the railroad company to enter upon and appropriate to its own use for railroad purposes the premises in question.

It is clear that this court is not required to accept the construction thus put upon the grant by the State court as authoritative. This court will determine for itself whether the grant may not include the land of the State which in this case had been taken possession of by the railroad company, and of the use of which it has been forcibly deprived. It is respectfully insisted on behalf of the railroad company that the decision of the State court is manifestly erroneous, and it is the object of

this brief to point out the reasons for that conclusion. We contend and will endeavor to show:

1. That the narrow and restricted interpretation given to the word "lands," is contrary to well and long settled legal principles.

2. That the decision is contrary to the interpretation put upon the statute at the time of its enactment, and ever since adhered to by those whose duties it has been to construe, execute and apply it.

3. That it is contrary to the interpretation put upon the statute by the Supreme Court of Illinois in 1853, immediately after the railroad was originally located.

4. That it is contrary to the construction adopted and acted upon by the legislature of Illinois, in a public act passed in 1869.

5. That it is contrary to the decision of the Circuit Court of the United States for the Northern District of Illinois, in a closely contested and thoroughly considered case adjudicated in 1888, which decision was afterwards affirmed by the Supreme Court of the United States.

I. It is a sound rule, which has been recognized as such by this court, and the doctrine is generally accepted, that whenever a legislature in this country "use a term, without defining it, which is well known in English law, and there has been a definite, appropriate meaning affixed to it, they must be supposed to use it in the sense in which it is understood in the English law." (*McCool* v. *Smith*, 1 Black, 459.)

And the Supreme Court of Illinois have repeatedly announced the same doctrine. (*Bedell* v. *Janney*, 4 Gilm., 193, 205; *Steere* v. *Brownell*, 124 Ills., 27, 31.)

The word "land" or "lands" is a word of that description. It is a word of very extensive signification, and comprehends all real property whatsoever.

> "It includes," says Blackstone, "not only the face of the earth, but everything under it or over it. And, therefore, if a man grants all his lands, he grants thereby all his mines of

metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. Not but the particular names of the things are equally sufficient to pass them, except in the instance of water; by a grant of which nothing passes but a right of fishing; but the capital distinction is this, that by the name of a castle, messuage, toft, croft, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of; but by the name of land, which is *nomen generalissimum,* everything terrestrial will pass." (2 Black. Com., 18.)

The rule is elementary, that a grant of "land," unless restrained by other words, will carry everything of a permanent nature which lies within the bounds of the grant. By the simple word "land" everything terrestrial passes.

"Land comprehends any ground, soil or earth, and whatever is contained within it or beneath its surface. But a grant of water does not include land, except in the case of salt pits or springs. Property in respect of water is predicated only of its use, except as connected with land." (1 Washburne on Real Prop., pp. 3, 4.)

"Real property is corporeal or incorporeal. *Corporeal* property consists wholly of substantial and permanent subjects, all which may be comprehended under the general denomination of land; which Lord Coke says, in its legal signification, comprehends any ground, soil or earth whatsoever; as meadows, pastures, woods, waters, marshes, furzes, and heath. It has also in its legal signification an indefinite extent, upwards as well as downwards; for it is a maxim of law that *cujus est solum, ejus est usque ad coelum.*" (1 Greenleaf's Cruise on Real Prop., 37 (46).)

A particular reference to the judicial decisions on this subject would be superfluous. There can be no debatable question that the word "lands," used in the third section of the railroad company's charter, is broad enough to include lands of the State covered by water. That is the legal signification of the word, and when it is contended that the word is there used in a less extended sense, it is incumbent on the disputant to point out

something in the context or in the subject-matter which satisfies the judicial mind that it is necessary to reject the plain, legal meaning of the language used in order to give effect to the real intention of the legislature.

There is nothing in the context which necessarily creates any ambiguity; nor are there any external or historical facts which suggest that the language used in making the grant, in the sense here attributed to it, does not express with entire precision the legislative intention. The construction of the railroad was regarded as an object of superlative importance to the State, and it was the evident intention of the legislature to put into the hands of the company the necessary means at its disposal to complete the enterprise and accomplish the purpose for which the work was undertaken. The State was not only vitally interested in the construction of the road, but it was to share permanently in the revenues to be derived from the operation of the road after its completion. Every intendment should therefore be made in favor of the company in order to give full effect to the grant. That such was the veritable intention of the legislature, is made incontestably manifest by that provision contained in the charter, that the act should be "favorably construed for all purposes therein expressed and declared, in all courts and places whatsoever."

The railroad was located by the company pursuant to the authority conferred by the charter. The location within the City of Chicago was made, necessarily, in conformity to the provisions of an ordinance passed by the common council, which required that the right of way, for more than a mile, and the depot grounds of the company should be located on the land of the State then covered by the shallow waters of the lake. The ordinance also required that the road should enter the city "at or near the intersection of its southern boundary with Lake Michigan." In order to comply with this mandate, it was found necessary to lay out the line for some distance below the southern boundary of the city (then Twenty-second street) along the margin of the lake. No objection to that

location was made by the public authorities, either State or municipal, or by anybody. The company acquired the title in fee simple to substantially all the land on the shore of the lake required for the tracks, and the railroad was there constructed.

This was in 1852—forty-seven years ago—when the population of Chicago is reported to have been not quite 39,000. By the census of 1850 the number was 28,269, and the entire population of Cook County was only 43,385. The whole number of inhabitants in all the counties of the State through or into which the road runs (thirty-one in all), according to the same census, was 186,433, and the entire population of the State was 851,470.

There is no fact or circumstance that can be pointed to in the situation existing in 1850, and nothing in the previous legislation of the State, tending to raise the slightest presumption that the legislature, if their attention had been directed to the precise point, would have deemed it necessary or wise to exclude from the grant made in the third section of the charter such small pieces of land covered by the shallow water of the lake adjacent to the railroad, as might be actually needed for the construction, maintenance or successful operation of the road. The appropriation of such parcels for necessary railway purposes could be no impairment of the public right of navigation, and the land had no intrinsic value. There is, therefore, we repeat, no rational ground for the belief that the legislature would have been restrained by any considerations of wisdom or policy to restrict the grant to lands not covered by water, even were it allowable, on conjectural grounds only, to depart from the plain language of a statute which has acquired at common law a settled meaning and is free from ambiguity.

The State court *concedes* in its opinion, that the first clause of section 3 of the charter conferred upon the company the right to take for *right of way* a strip of land 200 feet wide in the lake, upon the location of its line in 1852; but that fact, it is said, "has no bearing on the question involved here." As to

the land taken for right of way, the court say, "there has been no controversy from any quarter." This concession, in view of a previous decision of the same court made in 1853 and the action under it, to which attention will be more particularly called presently, could hardly have been avoided. But if the grant in the third section is broad enough to permit the company to take land in the lake for its right of way, how can it be consistently held that land so situated may not also be taken for depots, engine-houses and other buildings necessary for the successful operation of the road?

It will be observed that the grant is not confined to a right of way 200 feet in width. In the first clause of section 3, there is granted to the company the right "to appropriate to its sole use and control, for the purposes contemplated herein, land not exceeding 200 feet in width through its entire length"; but the very next clause, part of the same sentence, authorizes the company, in explicit terms, "to enter upon and take possession of any lands, etc., for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, station grounds, spoil banks, turn-outs, engine-houses, shops and other buildings necessary for the construction, completing, *altering, maintaining, preserving and complete operation of said road.*" This is followed by the formal granting clause: *"All such lands*, etc., belonging to the State are hereby granted to said corporation for said purposes." By what rule of interpretation, it may be pertinently asked, is it permissible to give one signification to the word "land" in the first clause of the section, and a narrower one to the same word in the second clause of the same sentence?

It will also be observed that the right of the company to appropriate to its use the lands of the State, is co-extensive with the power conferred in the same section of the charter to acquire by purchase or condemnation the land of private owners. The latter, it is thoroughly settled, is a continuing power which may be exercised from time to time as the necessities of the company may require. (*Chi. & W. I. R. R. Co.* v. *Ill. C.*

R. R. Co., 113 Ills., 156; *Fisher* v. *Chi. & Springfield R. R. Co.*, 104 Ills., 323; *Railroad Company* v. *Wilson*, 17 Ills., 123; *N. Y. and H. R. R. Co.* v. *Kip*, 46 N. Y., 546; Lewis on Eminent Domain, Sec. 259.)

The public have an interest in the use of a railroad, and in its being kept continuously in efficient condition to render the service required of it. If, in consequence of the growth and development of the country along its line, additional facilities are required for the transaction of its business, it is the duty of the company to supply them. It is obviously impossible for the directors of the company to foresee at the outset what quantity of land will be required at different places along its line for the proper performance of its public duties; and the law does not require that lands sought to be taken *in invitum* shall all be acquired before the road is opened for use.

But in this case the right is not left to construction or inference. Authority is conferred in express terms, to enter upon and take possession of all and singular any lands necessary for the *"construction, completing, altering, maintaining, preserving and complete operation of said road."* There is no limitation as to the time when, or the number of times, the power may be exercised. And the charter is still the law of the State. It remains in full force. No attempt has been made to repeal it or to restrain by subsequent legislation the exercise of the power to enter upon and use the lands of the State, not otherwise appropriated, for the authorized purposes.

That the land in question is actually needed for an authorized purpose is not denied by the city. The purpose is stated in the original bill. The land is required for an engine-house, and the facts showing an urgent necessity for the use of the land for that purpose are also stated in detail. It was stipulated by the parties at the hearing of the case in the court of original jurisdiction, that all the allegations of fact set forth in the bill shall be taken and considered as true. Among the facts stated are these: That the company "has no engine-house whatever in the City of Chicago at which it is practi-

cable for its engines to be overhauled and fitted for operation"; nor has it "any land whatever unoccupied by other necessary tracks and structures which is either sufficient in dimensions or suitably located, upon which to construct an engine-house of the necessary dimensions and capacity."

The land sought to be taken for the engine-house is of no value for purposes of navigation. In its present condition it is utterly useless to the State, or the public, for any purpose whatever. The fact is alleged in the bill, and is admitted by the stipulation, that the exterior breakwater or bulkhead "does not in any way whatever interfere with or impair the navigation of Lake Michigan, and that it is not located within the limits, and is not a part, of the harbor of the City of Chicago." It is furthermore stated in the official permit obtained in 1897 from the Secretary of War, that this question had been referred to the local engineer officer, and that he had reported "that the proposed work will in no way affect the general navigation of Lake Michigan or of Chicago harbor."

Much importance is attached in the opinion of the State court to the use of the word "streams" in section 3 of the charter. "If the legislature intended by the use of the word 'lands' to include lands covered by water, why," it is asked, "also use the word *streams*"?

The question is purely speculative, and no positive answer can be given to it. Legislative bills are not always drawn by practiced draftsmen, and, when they are, words are frequently interpolated by many different hands not skilled in the choice of apt words to convey the precise meaning. Most words in the English language are more or less elastic, and it frequently becomes necessary to adapt the meaning of a particular expression to that which best suits the scope and object of the statute. (Endlich on the Interpretation of Stat., Sec. 295, and cases there cited.) It is often necessary in the exposition of legislative enactments and legal instruments to have recourse to the rules which are furnished by the common law to relieve

the inadequacy of literal interpretation. To adhere rigidly to the literal meaning would have the effect in some cases to pervert the real meaning.

The inference drawn by the State court from the use of the word "streams" is wholly *conjectural*, and it can be easily shown that the guess is very wide of the mark. Had the legislature intended to restrict the meaning of the word "lands" to lands not covered by water, can it be rationally supposed that they would have resorted to so inapt and equivocal a mode of signifying the intention? There is nothing in the context to indicate that the word "streams" was inserted for the purpose of *abridging* the grant. It is perfectly manifest, on the contrary, that the word was added for the very different purpose of making it clear that no restriction was intended. It is impossible to deny that the legislative intention manifested in section 3 was to place in the hands of the company both the lands and waters belonging to the State, not appropriated to other uses, which were reasonably necessary for the construction, maintenance and operation of the railroad. The word *streams* is not a technical word like "lands," and it is capable of being used in more senses than one. According to familiar rules of interpretation, it may be read in a more extended sense than its literal import, if that should be necessary in order to give a sensible and intelligent effect to the general purpose of the statute.

It is well known by all familiar with the jurisprudence of the State that there are no streams in Illinois, if the word be taken in its literal sense, strictly belonging to the State. It has been uniformly held since the decision in *Middleton* v. *Pritchard*, 3 Scam., 510, that the title to the soil under all the navigable rivers in the State is vested in the riparian owners. Rivers above tide-water, although navigable in fact, are not deemed navigable in law, and the question of ownership in the river-bed is decided in accordance with the ancient principles of the common law. (Gould on Waters, Sec. 69.)

Since, then, the State had no property in the beds of running rivers, rivulets or brooks, and as the express language of

the granting clause is, "All such lands, waters, materials and privileges *belonging to the State* are granted to said corporation for said purposes," the inference is not unreasonable nor far-fetched that the word "streams" was used in a broad sense to cover any waters in which the State had a proprietary interest.

But, as before intimated, the question is speculative, and not material. The statute uses the word *lands,* and nothing appears in the use of the accompanying word "streams," nor anywhere in the context, having any tendency to show that the word was not employed in its comprehensive, legal signification. Among the rules enacted in the Revised Statutes of the State to be observed in the construction of all statutes, is the following:

> "All general provisions, terms, phrases and expressions shall be liberally construed, in order that the true intent and meaning of the legislature may be fully carried out." (Rev. Stat., Chap. 131, Sec. 1.)

In the case cited below it was decided by the Supreme Court of Connecticut, that *highways* or *streets* are "lands" within the meaning of a general statute authorizing railroad companies to change the location of their roads, and take lands for additional tracks, depots, *etc.* It is said in the opinion of the court:

> "When the statute uses the word 'land' in granting to a railroad company the power to exercise the right of eminent domain, it will be presumed to use it in its comprehensive sense, as including all interests attached to it or growing out of it; especially is this so if otherwise the rights granted would be inadequate or incomplete." (*State* v. *R. R. Commissioners,* 15 Atl. Rep., 756, 758.)

The precise question involved in this case has been passed upon by the Supreme Court of Iowa. It was provided by a general statute in that State that "any railroad corporation shall be authorized to pass over, occupy and enjoy without pay-

ment of damages, any of the school, university, and saline or other *lands* of this State; provided, no more of such lands shall be taken than is required for the necessary use and convenience of such corporation." Railroads were constructed by two different companies across a bend in the Des Moines river, on land below high-water mark. The title to the river-bed was in the State; and it was held that the railroads were "lawfully constructed upon the public lands of the State." (*C., B. & Q. R. R. Co.* v. *Porter Bros.*, 72 Ia., 426.)

Another singular position is assumed in the opinion of the State court to the effect, that even if the grant in the company's charter is broad enough to include land covered by the shallow water of Lake Michigan, the grant was ineffectual, because in making the grant the State transcended its authority. The authority relied upon to sustain this position is *Illinois Central Railroad Co.* v. *Illinois*, 146 U. S., 387.

The controversy in that case related to lands situated on the border of Lake Michigan, between the mouth of the Chicago river and Sixteenth street, which had been reclaimed from the lake and occupied by the railroad company for railroad purposes; and to the title claimed by the company, under an act of the legislature passed in 1869, to a large tract of submerged land adjacent to the railroad, north of Sixteenth street. This tract embraced upwards of 1,000 acres, and included the whole of the outer harbor. The right of the company to retain possession of all the lands which had been actually occupied for railroad purposes, was confirmed by the court; but as to the large tract of submerged lands ceded by the act of 1869 it was held that the grant was revocable, and that having been revoked by a subsequent act passed in 1873, the title had been restored to the State, and the grant of 1869 was no longer effective. It was declared to be incompetent for the legislature to deprive the State of its ownership of the submerged lands in the harbor of Chicago, and place them in the hands of a private corporation beyond any future exercise of power over them by the State.

It was, however, conceded, and expressly decided, that there is no valid objection to grants by the State of small parcels of land under navigable waters, which do not substantially impair the public interest in the lands and waters remaining. A distinction was drawn between such grants and the cession of an entire harbor. Grants of such small parcels, it was said, are sustained in the adjudged cases as a valid exercise of legislative power; but that was declared to be a very different doctrine from one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay. "Such abdication," it was said, "is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public."

This is substantially all that was decided in the case referred to, so far as the decision has any bearing upon questions involved in the present controversy. It requires only a careful reading of the opinion to show that the State court has entirely misapprehended the effect of the decision, and that, instead of announcing the doctrine attributed to it in the State court, it adjudges precisely the contrary.

This mistake is the more remarkable, when what is now said is compared with what was said by the same court on the same subject only two years before. In 1889 an act was passed by the legislature giving authority to any board of park commissioners having control of any boulevard or driveway connecting with any public park under the control of such board, which bordered upon any public waters in the State, to extend such boulevard or driveway, of the width of not more than 200 feet, over and upon the bed of such public waters; provided that no such extension should be made "in such manner as to interfere with the navigation of such public waters for the purposes of commerce." The act also contained this further provision:

"In all cases where any boulevard or driveway is extended

> under the provisions hereof, the submerged lands lying between the shore of such public waters and the inner line of the extension of such boulevard or driveway shall be appropriated by the board of park commissioners to the purpose of defraying the cost of such extension, and to that end such board of park commissioners are authorized to sell and convey such submerged lands in fee simple by deeds duly executed on its behalf by its president and under its corporate seal, and every deed executed in pursuance hereof shall vest a good title in the grantee to the premises intended to be conveyed thereby."

Acting under the provisions of this act, the commissioners of Lincoln Park in Chicago surveyed and located a driveway over and upon Lake Michigan, in such manner that ninety-three acres of submerged land lay between the outer line of the driveway and the shore of the lake. That portion of this large tract lying between the driveway and the shore (more than nine-tenths of the whole) was divided into parcels and sold to the shore owners, each shore owner obtaining that portion of the land lying opposite to the premises owned by him. In consideration of the sale, the shore owners agreed to construct the driveway in the lake and fill in the submerged land between the driveway and the shore, and also to pay the commissioners $100 for each lineal foot of their respective frontages upon the lake. An information was brought by the attorney general to annul these contracts and compel the filling already done under the contracts to be removed. It was contended on behalf of the complainant that the legislature had no power to alienate the lands under the waters of Lake Michigan as proposed by the act of 1889, and that such lands could be disposed of by the State only in aid of trade, commerce and navigation.

It was decided by the court that the act of 1889 was a valid exercise of legislative power, and that there was no legal or constitutional objection to the reclamation of the submerged lands or to the disposal which had been made of them by the commissioners.

It is said in the opinion of the court to be well settled, that

the title to lands covered by the waters of Lake Michigan within the boundaries of the State is vested in the State; but that the fee is held in trust for the public, and that the governmental powers of the State over these lands cannot be relinquished. Reference is made to the decision in *Illinois Central Railroad Company* v. *Illinois,* 146 U. S., 387, and the doctrine announced in that case is treated as sound. But did the State (asks the court) repudiate the trust and transcend its powers in the enactment of 1889? The question, it is said, is not one of policy or expediency, but one of power. "Was the legislature clothed with power to convey reclaimed lands which were originally covered by the waters of Lake Michigan"? This is followed by the following paragraph:

> "*In Illinois Central Railroad Co.* v. *Illinois, supra,* in speaking of this question of power, the court said: 'The ownership of the navigable waters of the harbor, and of the lands under them, is a subject of public concern to the whole people of the State. The trust with which they are held, therefore, is governmental, and cannot be alienated, except in the instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.' In the case cited the court recognizes the power of the State to convey parcels of the lands held by the State under navigable waters when such conveyances will not impair the public interest in the lands and waters remaining."

Further on in the same opinion the conclusion reached by the court is announced as follows:

> "Under the authorities the law seems to be well settled that the legislature was clothed with power to enact a law authorizing the extension of the driveway over and upon the waters of the lake, so long as the extension did not interfere with navigation, commerce and the right of fishery upon the lake, and we see no reason why the submerged lands reclaimed by the extension of the driveway may not, as provided in the act, be appropriated for the payment of the improvement. The

legislature represents not only the State, which holds the title which at common law was vested in the crown, but the legislature also represents the public, for whose benefit the title is held, and in that capacity possesses the sovereign power of parliament over the waters of the lake and the submerged lands covered by the waters. In providing for the construction of the drive over and upon the shoal waters of the lake and placing the control in the hands of the park commissioners for park purposes, no attempt has been made by the legislature to relinquish its governmental powers or place them beyond the power of future legislation." (*The People* v. *Kirk*, 162 Ill., 138.)

A glaring discrepancy between these two decisions is manifest. If it is competent for the State to dispose of ninety-three acres of land in the lake for the purpose of constructing a driveway intended only for pleasure travel, it is hard to understand why much more insignificant parcels may not be granted by the legislature to aid in the construction and improvement of a great agency of commerce, in which the State of Illinois has so large an interest as it has in the Illinois Central Railroad.

II. The construction put upon the statute in the State court in the case under review, is contrary to the interpretation publicly placed upon it at the time of its enactment by the directors of the company and by the public authorities, whose duty it was to construe, execute and apply it.

The persons constituting the first board of directors were named in the charter. Many of them were men of unusual intelligence and ability, whose names will doubtless be well remembered by some of the justices of this court. The board consisted (Sec. 6) of Robert Schuyler, George Griswold, Gouverneur Morris, Franklin Haven, David A. Neal, Robert Rantoul, Jr., Jonathan Sturges, George W. Ludlow, John F. A. Sandford, Henry Grinnell, Joseph W. Alsop, Leroy Wiley and the governor of the State. The governor of the State was made a director perpetually, *ex-officio*. (Sec. 5.)

One of the first duties requiring the attention of the board was the location of the road; and the location could be made within the City of Chicago only with the consent of the common council. That consent was obtained by an ordinance passed June 14, 1852, which forms part of the record in *Illinois Central Railroad Company* v. *Illinois*, 146 U. S., 387, and also of the record in a most pertinent and decisive case in the State court presently to be brought to the notice of this court.

The ordinance provided (Sec. 1) that the road should enter the city

> "at or near the intersection of its southern boundary with Lake Michigan, and following the shore on or near the margin of said lake northerly to the southern bounds of the open space known as Lake Park, in front of canal section fifteen, continue northerly across the open space in front of said section fifteen to such grounds as the company may acquire between the north line of Randolph street and the Chicago river, in the Fort Dearborn Addition to said city, upon which said grounds shall be located the depot of said railroad within the city, and such other buildings, slips or apparatus as may be necessary and convenient for the business of said company."

The strip of ground designated in the ordinance for the location of the railroad between the southern boundary of Lake Park and the north line of Randolph street—a distance exceeding one mile—was then covered by the waters of the lake. The land to be reclaimed from the lake for the depot grounds, etc., between Randolph street and the river, embraced an area of some thirty acres.

The railroad was located by the board of directors and built as prescribed by the ordinance, and the land in the lake designated for the location of the depot and other buildings was reclaimed and occupied by the company.

It has never been pretended that the city had any title to or proprietary interest in the land covered by the water of the lake. That land belonged to the State. The *ordinance*, therefore, conferred no right upon the company to take possession

of and appropriate it. The city had no more authority to make a grant of land forming part of the bed of the lake than it had to dispose of the land of private owners upon the shore; and care was taken to guard the city against any inference or implication that it had assumed any such authority by inserting in the ordinance the provision:

> "But it is expressly understood that the city of Chicago does not undertake to obtain for said company any right of way, or other right, privilege or easement, not now in the power of said city to grant or confer, or to assume any liability or responsibility for the acts of said company."

The city could say where the railroad should be located. No part of the land within the location, as made, belonged to the city. Some of it belonged to private owners, and the rest belonged to the State. As to the latter, it was assumed both by the directors and by the municipal authorities that the right to appropriate it was conferred by the company's charter. The right so acquired, as will presently be seen, was soon afterwards affirmed by the Supreme Court of the State; and the company has ever since remained in the undisturbed possession of the land occupied. In repeated instances after the original location was made, as shown in *Illinois Central Railroad Company* v. *Illinois, supra,* sometimes with, but for the most part without, the formal consent of the city council, additional small parcels of land adjacent to the road were reclaimed from the lake and occupied by the company as its necessities required.

The contemporaneous construction thus put upon the grant made in the third section of the company's charter cannot be disregarded except for cogent reasons. "It is said," according to Endlich—the author of a judicious and instructive work on the Interpretation of Statutes—"that the best exposition of a statute or any other document is that which it has received from contemporary authority." Even if the language be obscure, instead of being clear, the understanding of it when the statute first went into effect, if publicly acted on, especially

when sanctioned by long acquiescence on the part of the legislature and judicial tribunals, is presumed to be the true one. (Endlich on the Interpretation of Statutes, §§ 357, 358, and cases there cited; 23 Am. and Eng. Ency. of Law, 339.) Moreover, the doctrine is well settled, that, in order to understand the scope and meaning of an enactment, the court will take judicial notice of contemporaneous history and of the construction put upon the enactment by long and notorious usage. (Endlich on the Interpretation of Stat., § 29, and cases there cited.)

III. The construction now placed upon the statute by the State court is diametrically opposed to that judicially announced and acted upon by the same court in 1853, immediately after the railroad was originally located.

In acquiring the lands designated in the ordinance for the location of depots, etc., situated between Randolph street and the river, it became necessary to resort to condemnation proceedings, and a petition was filed in the County Court for the appointment of appraisers to assess the damages which would be sustained by the owners of the land upon the shore of the lake proposed to be taken. Objections were made to the application and the judge of the County Court refused to entertain the petition. Application was then made by the company directly to the Supreme Court for a mandamus to compel the county judge to proceed with the case and appoint appraisers. It appears from the original record of the case in the Supreme Court (an exemplified copy of which has been filed in this court), that the object of the proceeding in the County Court was to condemn not only parts of the lots of land on the shore belonging to the several lot owners, which were contiguous to the lake, but also all the right, title and interest such owners might have in the land under the lake, in front of their respective lots, which was included within the area proposed to be filled in and reclaimed, as contemplated in the ordinance of the common council. It

also appears from the same record that the ordinance of June 14, 1852, was introduced in evidence, and the ordinance is there set forth at length.

It was contended by counsel for the lot owners (as shown in the published report of the case), that the premises in question were parcel of the harbor of Chicago, and that the company had no right to enter upon and occupy any portion of the bed of Lake Michigan. For the railroad Company it was contended, that the bed of Lake Michigan belonged to the State of Illinois, and that "the State had, by the express words of the charter, given the railroad company the authority to locate their road over the bed and in the waters of the lake."

The case being considered one of urgent importance, the decision of the court was announced without assigning the reasons for it. It was *held,* that the company "has the right *by its charter* to locate the road over the premises in question, the City of Chicago having assented," and that it was the duty of "the defendant to appoint appraisers, according to the prayer of the petition." A peremptory mandamus was, therefore, awarded. (*Illinois Central Railroad Company* v. *Rucker,* 14 Ills., 353.)

The court was composed at that time of the following judges: Samuel H. Treat, Chief Justice (afterwards, for many years, judge of the United States District Court for the Southern District of Illinois), John D. Caton and Lyman Trumbull.

It is said by the State court in the present case, that it does not regard the above adjudication "as one having a bearing on the question presented by this record." "It appears," says the court, "that no question was raised or decided, as we understand the case, in regard to the right of the railroad company to go beyond the 200 feet granted and selected for right of way and take lands covered by the waters of the lake for an engine-house or for other railroad purposes named in the charter."

In this it is apparent that the court was egregiously misled and utterly failed to understand the gist of the former decision.

The land sought to be condemned in that case was all north of Randolph street, and it was condemned, not for "right of way," but, as shown by the record, "*for the location thereon of their depots, station grounds, engine houses, turn-tables, turn-outs, and other buildings and erections necessary for the construction and complete operation of the said road.*" The right of way terminated at Randolph street, and so far as it was located in the waters of the lake, lay in front of the public grounds upon the shore. No private interests were affected by that location. The *only* question directly in controversy was as to the right of the company to appropriate land upon the shore of the lake, and in the waters in front of it, for its *depots, station grounds, engine houses, etc.*, as contemplated in the first section of the ordinance hereinbefore referred to; and the decision of the court distinctly was that the company had that right *by its charter.*

But if the understanding acted upon by the court were correct, instead of being palpably erroneous, the opinion expressed in its decision, that the case had no "bearing on the question presented by this record," would be scarcely less unsound and illogical. If the charter conferred the right to appropriate for *right of way* land of the State forming part of the bed of the lake, which is conceded by the State court, how can it be consistently urged that it did not also confer the right to take other land, similarly situated, for other necessary purposes? That question has been sufficiently discussed in a former part of this brief, and there can be no doubt as to the answer which must be made to it.

We say, then, that the construction put upon the language of the third section of the charter by the directors of the company and by the municipal authorities has been sanctioned by a judicial decision which ought to be accepted as conclusive. Under that construction property rights have been acquired; the judicial interpretation has been followed by long usage, and a reversal of the decision would be in practical effect the same as a change in the statute. (Sutherland on Stat. Construction, §§ 312-319, and cases there cited.)

IV. The construction now put upon the statute by the State court is repugnant to the construction sanctioned and acted upon by the legislature in a public act passed in 1869.

The act referred to has been the subject of much consideration in the Circuit Court of the United States for the Northern District of Illinois, and also in this court. It is the statute referred to on page 18 of this brief. The act is entitled, "An Act in relation to a portion of the submerged lands and Lake Park grounds lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of the city of Chicago," and was passed April 16, 1869.

The act contained this clause:

> "SEC. 3. The right of the Illinois Central Railroad Company, *under the grant from the State in its charter,* which said grant constitutes a part of the consideration for which the said company pays to the State at least seven per cent. of its gross earnings, and under and by virtue of its appropriation, occupancy, use and control, and the riparian ownership incident to such grant, appropriation, occupancy, use and control, in and to the lands submerged or otherwise lying east of the said line running parallel with and four hundred feet east of the west line of Michigan avenue, in fractional sections ten (10) and fifteen (15), township and range as aforesaid, is hereby confirmed."

This is followed by a clause making a further extensive grant to the company covering the submerged lands now included within the outer harbor. (Public Laws of Ills., 1869, p. 246.)

The right of the company, *under the grant from the State in its charter,* to enter upon and appropriate lands covered by the waters of the lake, which were needed for its road, is clearly recognized in the clause above quoted. We have, therefore, not merely long acquiescence on the part of the legislature in the contemporaneous understanding of the language used in section 3 of the company's charter, and in the practical application which had been made of it prior to 1869—that is, during

a period of eighteen years,—but we have what is equivalent to an express legislative declaration that the language was used in the sense which had been attributed to it.

V. The new construction announced by the State court is in direct conflict with the well considered judgment of the Circuit Court of the United States for the Northern District of Illinois in a former suit brought by the State against the railroad company, involving, with other issues, the precise legal question now under discussion, which judgment was afterwards affirmed by this court.

In 1883 an information in equity was filed by the attorney general, in the name of the People of the State of Illinois, against the Illinois Central Railroad Company, in one of the State courts in Chicago, in which complaint was made, among other things, that the railroad company claimed the right, under its charter, to fill in and occupy the bed of Lake Michigan in front of fractional sections 10 and 15 in Chicago (lying between the river and Twelfth street), and under color thereof had made encroachments on the domain of the State by entering upon the bed of the lake in front of those sections, and filling in portions thereof and appropriating the same to its own use for railroad purposes. It was alleged that the claims made by the railroad company were unfounded, and the court was asked "to adjust and determine the title to the portion of the lake in question, and to limit and determine the rights therein of the Illinois Central Railroad Company." The relief prayed for was, in part, "that the structures and erections, all filling, piling and crib-work and pier constructions made by the Illinois Central Railroad Company upon or in the said domain of the State may be directed to be removed and such domain restored to the condition in which it was before such constructions were made."

In the answer to the information filed by the railroad company, the grants made by the State to the company in its charter were set forth in substance, and also the permission given

by the city ordinance of June 14, 1852, to locate the railroad tracks within the city of Chicago. The answer also contained the following admissions and averments: That the company, having become the owner of all the land on the shore between Randolph street and the river, had filled in a portion of the bed of the lake in front of it, and was occupying the same for railroad purposes; that its railroad had been constructed within the city upon the route designated in the ordinance, and that afterwards several small parcels of land south of Randolph street, adjacent to the right of way, had been reclaimed from the lake and occupied by the company; and that the respondent had begun and was then prosecuting the work of filling with earth a portion of what had been the bed of the lake, between Twelfth street and Sixteenth street, but that it was the owner of all the ground bordering on the lake at the points where such work was in progress. With reference to all these constructions, it was alleged that they were necessary for the maintenance and complete operation of the railroad; that they did not extend into the lake to the detriment of navigation, and that the company claimed title to all the land which had been thus appropriated, and the right to the possession and use of the same, under and by virtue of the grants made in its charter.

The respondent also asserted title to the land so occupied under and by virtue of the grants made in the legislative act of April 16, 1869, referred to on page 28 *ante;* and it was further averred that, relying upon the provisions of said act, the respondent had, from time to time, after the passage and before the attempted repeal thereof, and before the filing of the original information in that cause, entered upon, reclaimed and reduced to profitable use considerable portions of the submerged lands thereby granted, and in so doing had made large expenditures.

The case was removed from the State court into the Circuit Court of the United States at Chicago on the petition of the respondent, and came on for final hearing upon the pleadings

and proofs at the July term, 1887, before Mr. Justice Harlan and Hon. Henry W. Blodgett, District Judge. The opinion of the court was delivered by Mr. Justice Harlan, and a final decree was entered September 24, 1888, in conformity to the opinion.

It was *held,* that the charter of the railroad company granted to it the right to take and use all such lands and waters belonging to the State as were necessary to the construction and complete operation of its road, provided such use did not interrupt the navigation of the waters; and that, under the showing made, there was no basis for a decree declaring the structures complained of to be illegal,—such structures appearing from the evidence to have been required by the growing business of the company, and therefore necessary for "the complete operation of the road," and it not appearing that such use of the waters of the lake materially obstructed navigation. (*State of Illinois* v. *Illinois Central Railroad Co.,* 33 Fed. Rep., 730.)

It was adjudged in the decree, that the railroad company was entitled to retain the possession of all the constructions complained of which it had made in the lake; that they were lawful structures and not encroachments upon the domain of the State of Illinois, but with respect to the large tract of submerged land granted in the act of April 16, 1869, that the repeal of that act in 1873 had the effect in law to re-invest the State with the same right and title in the premises that it had prior to the passage of the act of 1869, saving, however, to the railroad company, as unaffected by the repeal, the right to hold and use so much of the tract as it had reclaimed from the lake and was in possession of.

Upon the hearing of the appeal from that decree in the Supreme Court, the decree was modified in one or two particulars, not affecting, however, in the slightest degree any question involved in the present controversy. The court was not satisfied from the evidence that the three piers which had been constructed between the Chicago river and Randolph street,

and the pier and docks between and in front of Twelfth and Sixteenth streets, did not extend into the lake beyond the line of navigability, and it was ordered that the case be remanded to the Circuit Court with directions to order such investigation to be made as would enable it to determine whether those works did not extend into the lake beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on the lake, and, if it should be determined that they did not extend beyond such point, to affirm the title and possession of the railroad company. Except as modified in those particulars, the decree of the Circuit Court was affirmed. (*Illinois Central Railroad Co.* v. *Illinois,* 146 U. S., 387.)

The result of the investigation made by the Circuit Court pursuant to the mandate of the Supreme Court is shown in *People of State of Illinois* v. *Illinois Central Railroad Co.,* 91 Fed. Rep., 955.

With reference to the judgment of the Circuit Court in the original case (33 Fed. Rep., 730), it is said in the opinion of this court (146 U. S., 434):

> "We agree with the court below that, to a clear understanding of the numerous questions presented in this case, it was necessary to trace the history of the title to the several parcels of land claimed by the company. And the court, in its elaborate opinion (33 Fed. Rep., 730), for that purpose referred to the legislation of the United States and of the State, and to ordinances of the city and proceedings thereunder, and stated, with great minuteness of detail, every material provision of law and every step taken. We have with great care gone over the history detailed and are satisfied with its entire accuracy."

This commendation of the extraordinary pains taken in the Circuit Court to elucidate the facts, which were complicated and exceedingly voluminous, and to investigate the principles of law applicable was fully merited. The reported cases are rare, in which more painstaking and conscientious labor is

shown to have been undertaken by a court to reach correct conclusions upon the law and the facts.

These two decisions are referred to in the opinion of the State court in the case under review, but they appear to have received no attentive consideration. All that is said is:

> "There may be found expressions in the opinion of the Supreme Court which might seem to favor the view of appellant, but when the facts of that case are taken into consideration and the entire opinion is examined we do not think that the case lends support to the position of appellant in this case."

The point seems to have wholly escaped observation, that it was distinctly decided by the Circuit Court that the right was conferred upon the railroad company *by its charter* to take and use all such lands covered by the shallow waters of Lake Michigan, belonging to the State, as were necessary to the construction and complete operation of its railroad, provided such use did not materially interfere with the public right of navigation, and that the judgment of the Circuit Court had been affirmed in this court. We must be pardoned for thinking that those cases (to which the City of Chicago was a party) *do* "lend support" to the position taken by the appellant in the State court. And, sustained, as the conclusion reached by the Federal courts is, by the contemporaneous construction put upon the charter, and by the former judgment of the State Supreme Court, followed by the concordant interpretation subsequently adopted and acted upon by the State legislature, it is respectfully submitted, that it is but reasonable and just that that conclusion should be accepted as final by all the parties.

BENJAMIN F. AYER,
For Plaintiff in Error.

WILLIAM D. GUTHRIE,
JAMES FENTRESS,
Of Counsel.

Office Supreme Court U. S.
FILED
JAN 11 1900
JAMES H. McKENNEY,
Clerk

No. 114.

Brf. of Guthrie, Ayer & Fentress for P. C. (reply)

Filed Jan. 11, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

NO. 114.

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in error,
vs.
THE CITY OF CHICAGO.

In error to the Supreme Court of Illinois.

BRIEF IN REPLY TO ARGUMENT ON BEHALF OF THE CITY OF CHICAGO.

WILLIAM D. GUTHRIE,
For plaintiff in error.

BENJAMIN F. AYER,
JAMES FENTRESS,
Of counsel.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 114.

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in error,

vs.

THE CITY OF CHICAGO.

In error to the Supreme Court of Illinois.

BRIEF IN REPLY TO ARGUMENT ON BEHALF OF THE CITY OF CHICAGO.

I.

As to the jurisdiction of this court.

A federal question is presented in this record because an attempt is made, by virtue of the act of April 10, 1872, under which the present city of Chicago was organized in 1875, and by virtue of certain recent ordinances, to impair and deny the contract rights of the Illinois Central Railroad Company, plaintiff in error, conferred by the charter of February 10, 1851. The submerged lands now in question were brought within the city limits or jurisdiction by the act of February 12, 1853, passed two years subsequent to the charter. The protection of the contract clause of the federal constitution was distinctly pleaded as the ground of action (record, p. 18), and the decision of the court below was in favor of the city's claim and necessarily gave effect to subsequent legislation and ordinances impairing the obligation of the contract contained in the charter.

The answer of the city of Chicago alleges as follows (record, p. 37, 40–41):

> "And this defendant further says that it is a municipal corporation, organized and subsisting under and by virtue of that

certain act of the General Assembly of the State of Illinois, entitled 'An act to provide for the incorporation of cities and villages (approved April 10, 1872, in force July 1, 1872),' and the several acts amendatory thereof and supplementary thereto, and that, among other things, it is empowered to regulate and control the use of public landing places for docks and levees; to control and regulate the anchorage, moorage and landing of all water crafts and their cargoes; to make regulations in regard to the use of harbors, and to appoint harbor masters and define their duties, and that in the exercise of such power this defendant has, through its police power, prevented the said complainant hitherto from filling up the said lake and intruding upon the navigable waters thereof. . . . . And that it is further made the duty of the city of Chicago, by its charter, to regulate the police of said city and pass and enforce all necessary police ordinances; that the city council of said city has made and established the following ordinances:

" '790. (Police powers.)—The harbor master and assistant harbor masters shall be sworn in as special policemen by the superintendent of police, for the purpose of carrying more readily into effect the police regulations of the city concerning the harbor under their charge, and to preserve the public peace and quiet in and about the harbor, and for such purposes shall have all the power and authority of police officers under the laws of the State and the ordinances of the city of Chicago.'

" '791. (Definitions.)—The harbor shall consist of the Chicago river and its branches to their respective sources, including that portion known as the Ogden canal, and all slips adjacent to and connecting with the Chicago river, the piers, and basins, including the waters of the Government breakwater which lie adjoining to, and extending three miles into the lake between the north and south lines of the city, and all the territory embraced between the limits of said survey as aforesaid shall be a portion of the harbor of the city of Chicago, and shall be subject to the control of the harbor master and to all the rules and regulations of this chapter, or which shall be hereafter provided by the city council. The words 'vessel,' 'crafts' and 'floats' shall be deemed to include every species of steam and other vessels lying or floating in or navigating the harbor.'

" '793. (Pile-driving—encroachment on harbor lines.)—No person or persons shall drive or place, or cause to be driven or placed any pile or piles, stone, timbers, earth or other obstruction in the harbor of the city without permission of the commissioner of public works, nor shall any person or company use

the piers of the harbors erected by the Government of the United States without the permission of the agent of the United States for said piers, or the harbor master. It shall be the duty of the harbor master to report to the city engineer any and all encroachments upon the harbor lines as now established, or which may hereafter be established, and thereupon they shall take such action as may be necessary to enforce the provisions of this chapter.'

"'795. (Penalties.)—Any person or persons violating any provision of either of the last two sections of this chapter shall, on conviction thereof, be fined not less than twenty-five dollars, nor more than fifty dollars for the first offense, and not more than seventy-five dollars for each and every subsequent offense.'

"And that said ordinances are in full force and effect, and that the said arrests complained of in the said bill of complaint was made on complaints respectively for a violation of said ordinances, or some of them, in the police courts of said city, and that this court has no jurisdiction covering the same, nor power or authority to prevent the enforcement of said ordinances."

The case is brought by these allegations strictly within the rule laid down in *Hamilton Gas Light Co.* v. *Hamilton City*, 146 U. S. 258, 266, where Mr. Justice Harlan said:

"We sustain the jurisdiction of the Circuit Court because it appears that the defendant grounded its right to enact the ordinance in question, and to maintain and erect gas-works of its own, upon that section of the Municipal Code of Ohio, adopted in 1869 (now section 2486 of the Revised Statutes), providing that the city council of any city or village should have power, whenever it was deemed expedient and for the public good, to erect gas-works at the expense of the corporation, or to purchase gas-works already erected therein; which section the plaintiff contends, if construed as conferring the authority claimed, impaired the obligation of its contract previously made with the State and the city."

So in *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 10, Mr. Justice Brown said:

"We know of no case in which it has been held that an ordinance, alleged to impair a prior contract with a gas or water company, did not create a case under the Constitution and laws of the United States."

Illustrations of the application of the rule may also be found in *Weston and others* v. *The City Council of Charleston*, 2 Pet. 449, 463; *Home Ins. Co.* v. *City Council*, 93 U. S. 116, 121; *Williams* v. *Bruffy*, 96 U. S. 176, 183; *Murray* v. *Charleston*, 96 U. S. 432, 441; *New Orleans Water-Works Co.* v. *Rivers*, 115 U. S. 674, 681; *N. O. Waterworks* v. *La. Sugar Co.*, 125 U. S. 18, 31; *Bacon* v. *Texas*, 163 U. S. 207, 216; *Iron Mountain R. Co.* v. *City of Memphis*, 96 Fed. Rep. 113, 126 (1899).

Mr. Justice Brown, in the *Walla Walla* case, points out distinctly the difference between acts of a municipality "as the agent of the State for the preservation of peace and the protection of persons and property, and its acts as the agent of its citizens for the care and improvement of the public property and the adaptation of the city for the purposes of residence and business" (p. 8). This distinction operates in favor of the jurisdiction in the case at bar even more strongly than in the *Walla Walla* case, because in the latter case the city might well be considered as having made the contract in its proprietary capacity; whereas, in the case at bar, not only was the contract itself made between the state and the railroad company, but the ordinances of the city locating the track were passed in its capacity as "agent of the state," as we find repeatedly asserted in the defendant's brief now filed (pp. 23, 25, 27).

The defendant, notwithstanding the fact that this land at Twenty-seventh street was not within the city limits in 1851, and the explicit allegations in its answer grounding its right of interference with the railroad company upon the legislation of 1872 and the ordinances subsequently passed, and, notwithstanding that this was the point and defense litigated below, now seeks to change its position by claiming that it is not acting under any

legislation of 1872, but under the city charter in force in 1851. No reference, however, is contained in the record or even in the brief to the provisions of the charter in force in 1851; but the charter referred to must have been the act of February 14, 1851, four days *subsequent* to the charter (see appendix to this brief). This is the first time in the course of this litigation that any such claim has been advanced, or that any reference has been made to the charter of 1851, except that in its cross-bill (record, p. 42) the defendant alleged:

> "That heretofore, in the year 1851, your orator, The City of Chicago, then was a municipal corporation organized and acting under its special charter, under which it continued to exist and act until the year 1875, when it became incorporated under the general laws of said State."

With the exception of this reference the special charter does not appear, and there is nothing to enable the court to determine what its provisions were, or to show that they applied. But, clearly it was subsequent legislation which brought this land within the city's jurisdiction to consent to any location of railroad tracks. Whatever pre-emptive right existed in favor of the railroad company by virtue of the location in 1852 must be deemed to have been preserved unimpaired when the subsequent legislation extended the city limits so as to include the track at Twenty-seventh street. There is no suggestion that the ordinances relied on by the defendant and pleaded in its answer were in force in 1851, and in fact such is not the case.[1] It is, moreover, significant that reference is made in other portions of the defendant's brief (*e.g.*, p. 13) to the legislation of 1863, to the laws and ordinances of 1866, and to the revision of 1896, as support-

[1] Section 790 of the present ordinances was adopted April 8, 1897, and sections 791, 793 and 795 were adopted June 26, 1890. None of these four sections was in force prior to 1890.

ing the city's action, all subsequent to the act of 1851 incorporating the Illinois Central Railroad Company.

But even granting, only for the argument's sake, that in 1851, prior to the railroad company's charter, the city of Chicago was vested with power to regulate the lake front within or without the city limits as then existing to the extent now asserted, it is clear that any such authority must have been subject to the power of the legislature to grant the lands under water owned by the state, and that, if the grant to the Illinois Central Railroad Company means what the plaintiff in error contends, the prior authority or agency of the city, even if it existed, became inoperative, and was repealed or limited by the grant contained in the company's charter. It has never been suggested that the legislature could not grant the submerged land at Twenty-seventh street now in question without the city's consent, for the land was not then within the city limits, nor is it claimed that the city had any estate therein as riparian owner or otherwise. If any authority existing prior to February 10, 1851, was reinvested in the city or extended by the legislation of February 14, 1851, or that of 1853 and 1863, or by the municipal charter of 1875, or the ordinances of 1866, 1890 and 1897, this is obviously subsequent legislation, although it may be a mere re-enactment of what existed in 1851, or, in other words, a re-enforcement of the original authority. A similar point was urged in *Yazoo Railroad Co.* v. *Thomas*, 132 U. S. 174, 184, but Mr. Chief Justice Fuller said:

> "The result is the same, although the act of 1888 be regarded as simply putting in force revenue laws existing at the date of the company's charter, rather than itself imposing taxes, for if the contract existed those laws became inoperative, and would be reinstated by the act of 1888. The motion to dismiss the writ of error is therefore overruled."

It is, therefore, submitted that neither the contention that the city is acting by virtue of some legislation in force in 1851, nor the contention that the present legislation is similar to that in force in 1851, advances or strengthens the position of the city; and that the case must be considered upon the merits because properly presenting the controlling federal question of impairment of a contract by subsequent legislation.

II.

As to the requirement of the city's consent.

The brief now filed on behalf of the city of Chicago makes a point which was not anticipated or discussed in the arguments heretofore filed on behalf of the plaintiff in error, because it is now first made in this litigation. The point is that, whatever may be the scope of the grant to the Illinois Central Railroad Company by its charter of "all such lands, waters, materials and privileges belonging to the state," the act imposed the condition that the railroad company should not at any time take any state lands or waters within the limits of any city without the consent of its common council. The charter certainly does not so provide. Moreover, the lands in question were not within the city when the road was located, and the subsequent expansion of the city by the statute of 1853 could not impair any vested right of the railroad company to occupy public lands adjacent to its tracks for necessary railroad purposes. Between 1851 and 1853 it could have occupied these submerged lands "belonging to the state" under its charter grant and without any consent of the city. The subsequent expansion of the city by the statute of February 12, 1853, could not constitutionally impair a right incident to the location of 1852. The railroad company's tracks were brought

within the city limits by the subsequent acts of the state and city, but with all the rights then appertaining to the existing location,[1] and these rights included the right to occupy public lands when found necessary for the due operation of the railroad.

In support of the contention that the charter provides for the city's consent, the defendant's brief states (p. 4) that:

> "Until the present attempt of plaintiff in error, it has always recognized the necessity of getting the city's consent for any invasion it desired to make upon such public property."

This statement is inaccurate and must have been the result of inadvertence. The record discloses no such facts. The contrary is notorious. It is surprising that the city should make any such suggestion after the years of litigation in the Lake Front case, in which it was insisted by the city that it had never consented in any form to the alleged encroachments of the railroad company north of Randolph street and south of Park row which were then sought to be abated.

But the above statement in the defendant's brief surely implies, if it was not meant to suggest, that the railroad company, "until the present attempt," had "always" obtained the city's consent to the construction, not only of its tracks, but of its depots, station grounds, engine houses, etc., on submerged lands. This suggestion should be a most important and persuasive admission upon the point of contemporaneous construction. As the title to the submerged lands and the right to occupy and use them could only come from the state, and as there was no other grant from the state than that contained in the charter, the city's repeated consents "until the present attempt" to such occupation and use must fairly be

---

[1] *Peo. ex rel. Woodhaven Gas Co.* v. *Deehan*, 153 N. Y. 528, 532.

construed as an admission that the charter gave this right, and that the city has always heretofore consented to the exercise of the charter grant. As that consent is now arbitrarily refused and withdrawn (record p. 22), and as the city stands in the way of a terminal facility absolutely and indisputably necessary for the accommodation of the public, the question is sharply presented whether or not its consent is indispensable. We venture to characterize the present refusal to consent as arbitrary because the facts showing the absolute necessity for this engine house and the peculiar appropriateness and convenience of the place selected are undisputed (see discussion in original brief, pp. 16–18).

The relevant provisions of the charter may be again quoted for convenience of reference (see appendix to principal brief). Section 3 contains the grant of public lands and waters in the following language:

> "SEC. 3. The said corporation shall have right of way upon, and may appropriate to its sole use and control, for the purposes contemplated herein, land, not exceeding two hundred feet in width through its entire length; may enter upon and take possession of and use all and singular any lands, streams and materials of every kind, for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turnouts, engine houses, shops and other buildings necessary for the construction, completing, altering, maintaining, preserving and complete operation of said road. All such lands, waters, materials and privileges belonging to the state, are hereby granted to said corporation for said purposes; but when owned or belonging to any person, company or corporation, and cannot be obtained by voluntary grant or release, the same may be taken and paid for, if any damages are awarded, in the manner provided in 'An act to provide for a general system of railroad incorporations,' approved November fifth, one thousand eight hundred and forty-nine, and the final decision or award shall vest in the corporation hereby created all the rights, franchises and immunities in said act contemplated and provided."

In an entirely different and separate part of the statute, section 8, it is provided, among other things, that:

> "Nothing in this act contained shall authorize said corporation *to make a location of their track* within any city without the consent of the common council of said city."

The contention of the city upon this last-quoted language may be best stated in the language of its own brief, as follows:

> "This must be held to mean location of track *or other structures, depots, engine houses or otherwise*, over the streets, or any part of the lands contiguous to this city, under Lake Michigan, or any other public property over which the police powers of the city extend. . . . The road is forbidden to take any land, stream, etc., for its use 'within any city' without the city's consent. (Sec. 8, Charter.)." (Defendant's brief, pp. 4, 13.)

This interpolation of the words "or other structures, depots, engine houses or otherwise" is then sought to be sustained as the intention of the legislature, first, by stating facts not shown by the record, and, secondly, by asserting that the point was decided by the Supreme Court of Illinois in 1853. Thus, it is asserted in the defendant's brief, at pages 4 and 12, that:

> "In the case of *Illinois Central Railroad Co.* v. *Rucker*, 14 Ill., 353, the Supreme Court decides in favor of plaintiff in error expressly upon the ground that it had obtained the consent of the city council before locating its depot. . . . So the case relied on by plaintiff in error as an early construction of its charter holds that under such charter the city must assent to the taking of any public property within its jurisdiction" (p. 4); and "the Rucker case, *supra*, distinctly bases the right of plaintiff in error to build its depot in the lake at Randolph street, because it had obtained a city ordinance to that effect" (p. 12).

An examination of the record and report in the *Rucker* case will show that these statements are inaccurate. The language of the court (14 Ill., at p. 359) "that the relator has the right by its charter to locate the road over the

premises in question—the city of Chicago having assented," does not mean that the city's consent to either the location or the construction of a *depot* was necessary, but merely that, as required by section 8 of the charter, the city's consent to the location of the tracks over submerged lands had been duly obtained. The contention of the adversaries of the railroad company in that case was (p. 354) "that said corporation had no power to locate their said road in the waters of Lake Michigan," and that was the fundamental question presented for adjudication. If the railroad company had no right to locate its tracks on the submerged lands of the lake belonging to the state, the location would have been unauthorized notwithstanding the city's consent, and the right to condemn adjacent private property on the upland for "depots, station grounds, engine houses," etc., would have been denied. The court held that such location of the tracks on the submerged lands of the lake belonging to the state was authorized by the *charter*, and that the assent of the city to such location within the city had been duly obtained. The location of the depot, or the city's consent thereto, was not even mentioned in the report of the case.

It must be clear from the above statement that the *Rucker* case did not decide that the city's consent was necessary before a depot could be located or built, or before land could be either reclaimed or condemned for "depots, station grounds, engine houses," etc. There is really no color for the defendant's statement, except that the ordinance of 1852 allowed the railroad company "to build its depot *in the lake* at Randolph street" in connection with the consent to the location of the *tracks* within the city limits. A perusal of the ordinance of 1852, printed in full in the appendix to this brief, will show, as the city candidly concedes (defendant's brief, p. 5), that "the council then granted the right only on

hard conditions." Those conditions compelled not only the immense expense of filling in submerged lands for track, etc., but likewise the construction and maintenance for all time of a costly sea wall or breakwater to the southern limits of the city. The imposition of these conditions in the ordinance of 1852 in no sense supports the view that the statute required anything more than consent to the location of tracks. The fact that in 1852 the city imposed conditions upon granting its consent to the location of the tracks and the use of submerged lands in which it had the riparian interest and, as this court has since held, the title in fee, furnishes no support for reading into section 8, and even less for reading into section 3, of the railroad company's charter of 1851, a provision that the city's consent was requisite to the building of any depots or engine houses upon land belonging to the state and which the state had a year previously granted for a great public purpose. In truth, the requirement as to the city's consent went no further than, if indeed it went so far as, Mr. Justice Field pointed out in the Lake Front case (*Illinois Central Railroad* v. *Illinois*, 146 U. S. 387, 445):

> "The prohibition upon the company to make a location of its road within any city, without the consent of its common council, necessarily empowered that body to prescribe the conditions of the entry so far at least as to designate the place where it should be made, the character of the tracks to be laid, and the protection and guards that should be constructed to insure their safety."

The defendant's brief likewise refers to the ordinance of 1855 and makes the statement that this ordinance was obtained by the railroad company in order to enable it to acquire "more ground for a depot," etc., and "in order to reclaim additional submerged lands" (defendant's brief, p. 38). If, however, we refer to the ordinance of 1855, which

is printed in full in the appendix to this brief, the court will observe that it was passed because it had become necessary to curve the railroad *tracks* "westwardly of the line for its track fixed by the ordinance of June 14th, 1852," and for no other purpose. The permission or consent of the city was primarily to the curving or, in other words, to the re-locating of the tracks, and had no relation whatever to the acquisition of additional ground by the railroad company under its charter for a depot or otherwise, although, as before, regulations were imposed by the common council as conditions to its consent, and these conditions were again modified in the ordinance of 1856, which is also printed in the appendix to this brief. Moreover, so far as these ordinances of 1852, 1855 and 1856 constitute consents on the part of the city to fill in or reclaim submerged lands, they relate solely to lands in which the city had riparian rights irrespective of and prior to the railroad company's charter (*infra*, pp. 15–17). But it is altogether incorrect to say that these ordinances show that the railroad company sought from the city anything more than its consent to the location or the curving, *i. e.*, the relocation of the tracks. Certainly they do not show that the railroad company sought the city's consent to the filling in of the submerged lands belonging to the state and situated south of Park row, or anywhere else where the railroad company owned in fee down to the shore of Lake Michigan.

The ordinary and fair import of the language used in section 8 of the charter of the railroad company is to require the consent of the city council to the location of the general line or route of the tracks of the railroad upon entry into any city. Section 2 of the charter clearly shows that the legislature had in mind a nar-

row use of the words "locate" and "location." Thus, the power granted is to "survey, *locate*, construct, complete, alter, maintain and operate a railroad, with one or more tracks." There is no reason why the court should interpolate in section 3 any such addition as is now suggested in order to make the statute read that the city's consent should be necessary not only before the railroad company could "make a location of their track" but before it could "construct, complete, alter, maintain and operate" its road, or before it could locate or occupy land for necessary terminals or railroad "strucures, depots, engine houses or otherwise." The city's contention would equally preclude the acquisition or occupation of private land for terminals unless the city consented, a burden imposed upon no other railroad. It would draw all the powers granted, such as constructing, completing, altering and maintaining, within the city's jurisdiction to regulate by granting or withholding its consent. The legislature saw fit to limit the city's power to the "location" of tracks, and it is not within the province of the courts to extend it. *Expressio unius est exclusio alterius.* The wording could easily have been changed to express definitely the intention that the consent of each city along the route should be requisite to the "location of their track and terminal buildings"; but the language chosen by the legislature, undoubtedly with care and deliberation, was simply "location of their track," and this too was in a statute which distinguishes between "locating" and constructing, completing, altering and maintaining, and distinguishes also between tracks and "engine houses, shops and other buildings" necessary for a railroad.

It is not contended on behalf of the city that the title to the submerged lands at Twenty-seventh street now in

question or the power to dispose of these lands has ever been in any degree vested in it, for it has always contended that such title is in the state; and these lands, as is well settled in Illinois, can only be acquired through a grant from the legislature. The railroad company owns the upland. The city never had, and cannot now pretend to have, power to grant an inch of these submerged lands for any purpose, and its consent to an encroachment upon the lake for railroad or any other purposes would be valueless. *The city's contention really amounts to this, that although there was a grant of the public lands, "submerged or otherwise,"*[1] *as set forth in section 3 of the Illinois Central's charter, it was the intention of the legislature of Illinois to make entry under such grant dependent, so far as any lands or waters within any city were concerned, upon the condition of obtaining the consent of the common council of such city.* This would concede that there was a grant, leaving open only the question whether the legislature intended to create any such condition. No such condition or proviso is stated in the act of 1851. If the legislature had intended this condition, it would obviously have so stated in section 3 when it made the grant of the lands and waters belonging to the state, or in section 8 when it provided for the consent of any city to making "a location of their track within any city." Unless we are prepared to interpolate a limitation upon the grant which the legislature did not see fit to enact or provide, the present contention of the city must be overruled, and the existence of the grant recognized.

The reason why the city consented, in the several ordinances, to the filling in of the lake front between Randolph street and Park row was not that the char-

[1] See act of 1869.

ter of the Illinois Central so required, but that the riparian rights in respect of these particular submerged lands were then in the city. As to so much submerged land as fronted on the lake between these two streets, the city's consent as riparian owner was deemed necessary; and consequently the ordinances of 1852, 1855 and 1856 in this respect constituted a grant of a right of way or easement by the city, and were in no sense a consent to the appropriation of submerged land "belonging to the state." No such feature of city ownership of the upland existed as to the submerged lands south of Park row or as to those outside of the city limits. These submerged lands belonged to the state, and the city gave no consent to their filling in, for it did not own any of the upland. There can be no doubt about the accuracy of this statement if we refer to the ordinances and to the record and decision in the Lake Front case. Thus Mr. Justice Harlan said in the circuit court (33 Fed. Rep., at p. 758):

> "So that, when the Lake Front act of 1869 was passed, the fee was in the city of Chicago, subject to the public uses indicated, of all the then open ground south of the middle line of Madison street, and north of Park row, and east of the west line of Michigan avenue. And so, also, is the fee in the city of the made or reclaimed ground between Randolph street and Park row, including the ground upon which rest the tracks and breakwater constructed by the railroad company south of Randolph street."

And Mr. Justice Field said in this court (146 U. S. at p. 462):

> "We agree with the court below that the fee of the made or reclaimed ground between Randolph street and Park Row, embracing the ground upon which rest the tracks and the breakwater of the railroad company south of Randolph street, was in the city. The fact that the land which the city had a right to fill in and appropriate by virtue of its ownership of the grounds in front of the lake had been filled in by the railroad company in the construction of the tracks for its railroad and for the

breakwater on the shore west of it, did not deprive the city of its riparian rights. The exercise of those rights was only subject to the condition of the agreement with the city, under which the tracks and breakwater were constructed by the railroad company, and that was for a perpetual right of way over the ground for its tracks of railway, and, necessarily, the continuance of the breakwater as a protection of its works and the shore from the violence of the lake. With this reservation of the right of the railroad company to its use of the tracks on ground reclaimed by it and the continuance of the breakwater, the city possesses the same right of riparian ownership, and is at full liberty to exercise it, which it ever did."

The consent of the city in 1852 to the reclamation by the railroad company of that particular strip was probably deemed essential, inasmuch as the right of reclamation belonged to the city as riparian proprietor; and the *fee* of the lands covered by the railroad tracks and structures is now in the city subject to the perpetual right of user of the railroad company. The city, in the ordinances of 1852, 1855 and 1856, was consenting to the use of property which it undoubtedly claimed the pre-emptive right to fill in and reclaim. It will be noticed that it did not, in any of these ordinances, seek to grant, or regulate the use of, submerged lands south of Park row, except so far as it required that the railroad company should build its tracks over such submerged lands and should fill in and maintain a breakwater to protect the city from the encroachments of the lake. There was no consent under the railroad charter in the true sense of the word to the erection of a breakwater by the railroad company: that was purely a condition or obligation imposed by the city upon the railroad company in consideration of the grant to that company of the privilege of entering the city over lands under water. So, as Mr. Justice Harlan said (33 Fed Rep. at p. 759):

"The city was expressly given power, by its charter, to erect

a breakwater or barrier for protection against encroachment by the waters of the lake. If it had itself erected a breakwater, south of Randolph street, in front of fractional sections 10 and 15, on the precise line adopted by the railroad company under the ordinance of 1852, and filled in the space between the breakwater and the shore-line, it could not be doubted that it would have become the owner of all the ground thus reclaimed and occupied. But, instead of doing that work itself, the city employed the railroad company to do it, in consideration of the grant to that company of the privilege of entering the city, and of laying its tracks in front of Lake Park grounds, and of the open grounds south of Randolph street."

III.

As to the continuing power of the railroad company to condemn private property or to occupy vacant land belonging to the state for necessary railroad purposes.

The discussion in the original brief on the subject and effect of the contemporaneous interpretation when the tracks were located in 1852 is very much emphasized by the fact now asserted by the city that, in making this location, it acted as the agent of the state (defendant's brief, pp. 23, 25, 27). This location by the agent of the state in the ordinance of June 14, 1852, was immediately approved and adopted by the legislature itself in the act of June 22, 1852.[1] This act amended the charter of the Illinois Central and referred to the railroad company's track "as now located at or near Twelfth street in the city of Chicago" (see act of 1852, printed in the appendix to this brief). As there could be no location of tracks within the city without the consent of the common council, and as this act was passed eight days after the ordinance of 1852, it cannot be doubted that the legislature had the ordinance before it and knew that the city, as its agent, had located the tracks over the submerged lands of Lake Michigan, and that this

[1] See discussion in original brief as to the effect of legislative recognition, pp. 30–38.

location necessarily required the taking by the railroad of submerged lands belonging to the state within and without the then city limits. Indeed, so far as appears, the state owned no lands in or about the city of Chicago adjacent to the tracks of the Illinois Central in 1851 or subsequently, except the submerged lands; and, when the act of 1852 expressly recognized the due location of the tracks at Twelfth street, the legislature knew that there were no lands belonging to the state adjacent to such location except submerged lands. In view of this legislation, supplemented by the acts of 1861, 1863 and of 1869, which latter act mentions "the *right* of the Illinois Central Railroad Company, *under the grant from the State in its charter*, . . in and to the lands *submerged or otherwise*," etc., it is clear that the right now claimed does exist as fully as it existed and was exercised from 1852 to 1869.

In construing this charter, we must, of course, not only give reasonable effect to the declaration of the legislature in section 27 that it shall be "favorably construed for all purposes therein expressed" (which was inserted for the very object of preventing a strict construction), but also recognize that this railroad was a great public instrumentality intended for all time to promote and meet the development of the commerce of the Northwest and particularly the State of Illinois and its principal city, Chicago; that the company performs a necessary and useful function of the state; that the charter was granted at a time when the state was bankrupt and when, as the city candidly confesses (defendant's brief, p. 4), "the one idea of the community was to get a railroad at any cost;" and that the road was part of a permanent national system contemplated by the Act of Congress of

September 20, 1850, to facilitate which immensely valuable grants were made to the state of Illinois. If a strict interpretation is to be applied, the provision of section 27, on which the promoters of the road relied and acted, meant nothing, and was a snare. The general doctrine as to the strict construction of charters would thus be allowed to override the particular legislative intent expressly declaring that the strict rule of interpretation should not apply to this charter, which created a great public corporation and instrumentality in perpetuity, and reserved to the state a large share of the company's *gross* earnings, regardless of there being any net earnings whatever. The fact is known to all that the Illinois Central Railroad Company pays to the state of Illinois proportionately a greater tax than any other railroad in the United States. Thus the railroad company in 1897, as appears in the record (p. 12), paid the state under its charter $625,593.30. If that be capitalized on a four per cent. basis, we should have as the present value of the state's interest in the gross earnings of the railroad company at least $15,639,835. The grant was valuable, but the consideration was ample. Who could have foreseen that this provision of the charter which, in 1855, only returned to the state $29,000, would in time result in an income of more than $625,000 per annum?

The vital fact should never be lost sight of that the railroad company was compelled by the city in 1852 to locate on this lake front and over submerged lands. It was not its choice, but a hard and at the time almost ruinous condition. So situated, it absolutely needs an engine house at this spot. Is it not reasonable to permit it to occupy adjacent and vacant public lands to promote such a public necessity? There can be no sound doctrine of law or

public policy which should prevent a railroad company from increasing its terminal facilities by taking unappropriated and vacant submerged lands of the state to the extent that the requirements and necessities of the public may reasonably require, in preference to the condemnation of private property, particularly when the route was prescribed by statute and was actually located on the lake front by the city acting as "the agent of the state," and when such location when made was a "hard condition." Mr. Justice Shiras said in the Lake Front case, 146 U. S. 387, 467 (dissenting opinion):

> "It is matter of common knowledge that a great railroad system, like that of the Illinois Central Railroad Company, requires an extensive and constantly increasing territory for its terminal facilities."

In *Philadelphia, Wilmington and Baltimore Railroad Co.* v. *Williams*, 54 Pa. St. 103, 107, Agnew, J., said:

> "The expression 'as soon as they can conveniently locate and construct' is not a limitation upon the power to compel the company to exercise its whole authority in the very beginning, when the demands of business are few. It would be an unreasonable construction of its charter to require provision to be made for all the unknown wants of the future. The increase in trade and business, and the changes taking place, often require new and increased facilities."

Now, as we have seen in the original brief, the power of railroads in Illinois to acquire new lands by condemnation is a continuing power and may be exercised from time to time as increased facilities become necessary to meet the growth and development of the cities, towns and villages along the line. *The Chicago, Burlington and Quincy Railroad Co.* v. *Isaac G. Wilson*, 17 Ill. 123, 127; *Fisher* v. *C. & S. R. R. Co.*, 104 Ill. 323, 326; *C. & W. I. R. R. Co.* v. *I. C. R. R. Co.*, 113 Ill. 156, 162. The same is true as to the continuing power to purchase

lands or acquire them by gift. Were this not the universal rule, the progress and development of our great railroad systems would be paralyzed. If, in the case at bar, the railroad company were seeking to acquire private property under eminent domain, its continuing power to condemn could not be challenged, provided it showed a reasonable necessity for the acquisition of the property. The argument of the defendant must, therefore, be narrowed to the point that, although the power to condemn and take private property is a continuing power whenever a public necessity exists, the grant of power to appropriate, for the essentially public purpose of a railroad, vacant and unused land belonging to the state is exhausted or spent by the first location of the route, and that this original location should have been made broad enough to provide for all possible "unknown wants of the future." Yet, there is no sound distinction between private and public lands in respect of continuing power if measured by the continuing and ever-growing public necessity and demand.

If the charter of 1851 really granted to the railroad company any lands, waters, etc., adjacent to the tracks and then belonging to the state, why should not the right to use such lands be exercised from time to time whenever, but not before, it becomes *necessary* so to do, subject to the limitation or contingency that the lands may in the meantime be disposed of by the state or devoted to other public uses; and, if submerged lands are occupied, then provided also that practical navigability or the public convenience of access and egress be not interfered with? Is it not the true and only sound rule that the railroad company could not have taken in 1851 either private or public lands which were then unnecessary for railroad purposes upon the

theory that the growth of its business might possibly in the distant future—here forty-five years—require additional terminal facilities, and that it could not have done so at any time unless a necessity then actually existed?

The contention of the railroad company should not be misrepresented or exaggerated. It does not claim an unrestricted right to appropriate property belonging to the state, any more than it asserts the right to condemn private property indiscriminately and without showing both a public necessity for increased facilities and the propriety and convenience of the locality selected. It makes no extravagant claim of right in respect of submerged lands of the state. But it does contend that, in view of the location of its tracks in 1852, and whenever there is a reasonable necessity for increased terminal facilities in order to accommodate the public business and to facilitate the "completing, altering, maintaining, preserving and complete operation of said road," it may occupy and hold submerged lands belonging to the state which are situated adjacent to its line of tracks as located by the charter and ordinance, and which are not needed for any other public or private purpose, and when the land in question is more conveniently and safely situated for railroad uses than any private property in the neighborhood, and its occupancy will not interfere with navigability.

Moreover, the grant by the legislature in the charter of 1851 was not for the private use or convenience of the Illinois Central Company, as the city seems to consider, but solely to promote a great public purpose and vital necessity and to be used by the railroad company as an instrumentality of the state. Railroads are created primarily to perform public functions, and not for the profit of stockholders. The charter in this case con-

ferred valuable rights and franchises, but it likewise imposed duties, obligations and burdens. The railroad company was not only permitted but obligated to "locate, construct, complete, alter, maintain and operate a railroad, with one or more tracks, or lines of rails," etc., into the city of Chicago on Lake Michigan; and section 5 of the ordinance of 1852 expressly provides that "the said tracks shall be so constructed, furnished and operated as to meet the demands of business upon the streets and lines through and along which they shall run." The measure of the legal duty of the railroad should be the extent of its power. Its right to take public or private property must rest at all times solely upon the public necessity, and should be just as broad as that necessity, and no broader. The right to occupy submerged lands or to condemn private property could not have been exercised in 1852 in any particular case, unless a necessity born of the public demand then existed for the use of such property. The railroad company in 1852 could not have taken or condemned property then not needed simply in order to anticipate the marvelous growth of Chicago, which, indeed, no one foresaw. If a roundhouse to accommodate the traffic of the railroad has now become necessary, and if the locality selected is proper and convenient—and in the case at bar both are admitted—then it will be difficult to perceive any sound reason why the railroad company should not exercise in 1897 the power to occupy public lands as freely as it could, and was bound to, exercise it in 1852, or why any court should hold that the original location of track spent or exhausted the company's grant of power.

One of the city's suggestions would seem to be that, although the power to select parcels was validly granted to be

exercised in 1852, it was exhausted by the original location, or, in other words, "unless, indeed, such submerged lands were filled at once under that act" (of 1851).[1] This practically admits that the right to occupy submerged lands existed under the charter provided it was exercised "at once;" so that the railroad company could have filled in and built this engine house in 1852, but it cannot do so now, however great the present public necessity may be.

As the defendant puts it:

> "As we have said, the power of the plaintiff in error under its charter at the first location of its road is not in question" (defendant's brief, p. 46).

Of course, had it located and built the engine house in 1852 at this place, no consent of the city would have been necessary in any view, for the city did not extend beyond Twenty-second street.

Let us suppose that the railroad company were now to decline to furnish adequate facilities for the accommodation of the public—facilities which must be forty-fold what were needed or could reasonably have been anticipated in 1852. Would it not be preposterous for it to argue that it was only bound or permitted under its charter to furnish such facilities as were necessary in 1851 or 1852; that that was the limit and measure of its power and duty, and that the first location in 1852 exhausted its power to acquire lands? Any court would, of course, hold that the railroad company must augment its facilities with the increase of the demands of the public. If the Illinois Central's legal duty to the public obliges it to increase its terminal facilities, is it not within familiar rules vested with the power reasonably necessary to that end? It is

[1] Defendant's brief, p. 45.

compelled, by the development of the commerce at Chicago, to build an engine house. The public necessity for an engine house *somewhere adjacent* to its tracks as located by the city itself is not disputed (original brief, pp. 16–18). The railroad company finds that the most accessible and convenient place, and it may fairly be said the only practicable and safe place—having reasonable regard to the necessities and dangers of the railroad business—is this small parcel of submerged land which is adjacent to its tracks and to property which it owns in fee, which has been wholly enclosed by a breakwater or sea-wall since 1882, and which cannot be used for navigation or any other convenient public use. The propriety of the selection of this spot, its convenience to the public, the fact that it affords the safest place in view of the immense daily suburban traffic of the road, are not challenged. The issue is not as to the public necessity, but merely as to the technical power to occupy this vacant land. The propriety of the exercise of the power, if it exists, is not questioned. As the defendant candidly says:

> "A great part of the plaintiff's argument is directed to the point that the parcel of submerged land attempted to be seized is small and that no private or public rights are endangered or prejudiced thereby. But the size of the tract in question is not material. The principle involved is as wide as Lake Michigan and as deep as its deepest point. . . The argument of the public authorities is not based on the possibility of abuse; it is based on the total want of power in plaintiff to do what it has attempted, on the deliberate endeavor by plaintiff to seize public trust lands without a shadow of right or authority. . . The question as to whether plaintiff might abuse the privilege claimed by it or whether public or private convenience is more or less affected by this particular location of this round-house, or whether the four acres attempted to be seized is more or less valuable than other portions of the lake shore, is not in issue—the question is one simply of power" (defendant's brief, pp. 5, 40).

If the land belonged to a private individual, it could be condemned. It is, however, submerged land, and belongs to the state. It is clear that the state could make a grant of this portion of submerged land to be filled in for railroad purposes because, first, it would be devoting the land to a public use, and, secondly, the filling in would not interfere with navigation in any degree. . The power to grant exists in the legislature, and nowhere else, and its exercise in this instance would be justified by every consideration of public convenience and welfare. A statute now passed granting to the railroad company, in the language of the act of 1851, the right to occupy all lands and waters "belonging to the state" at Chicago which are "*necessary* for the construction, completing, altering, maintaining, preserving and complete operation of said road," would clearly cover the present case in view of the actual location of the road. It cannot be possible that a different rule applies because the charter was passed in 1851. For nearly half a century we have done what we are now attempting to do and never before in an instance where the public necessity was more pressing and evident. Certainly there should not be a different rule in this case than in 1852 and many years afterwards, especially where no police regulation is called for in respect of the public health, convenience or safety, and where the state, under whose grant we claim and in whom the title is, has never questioned the right to build the breakwater of 1882, and is not now challenging the right of this public corporation to fill in this tract for a necessary public purpose.

There would, of course, be a very important question of impairment of contract if the legislature should now attempt to wholly revoke the power it had given to this company to take public lands and waters for railroad pur-

poses, and it appeared that this unreasonably prevented the due operation of the railroad. The probability of the extension of the business and terminals from time to time undoubtedly had a potent influence upon persons contemplating the purchase of the stock and securities of the railroad company, and that right may well be said to have become vested, so long as vacant public lands adjacent to the tracks were conveniently and reasonably available. The location must be deemed to have been with relation to this probable increase of terminal requirements and the availability of the submerged lands belonging to the state.

The possibility of extravagant claims of power exists in the case of every company possessing the right to condemn, but there is ample power in the courts to restrain unnecessary appropriation of public lands as well as unnecessary condemnation of private property. If such a grant as that in the case at bar is to be stricken down because imagination may picture an attempt to occupy the whole city, and in time the whole lake, then the wise and broad-spirited doctrine of continuing power must be overturned, and the development of necessary railroad terminals must wait upon the pleasure of local authorities and legislatures. Of course, it is possible that any railroad might, under the general power customarily conferred, attempt to extend its station grounds, engine houses, machine shops, etc., to such an extent as to appropriate the greater part or the most valuable portion of any large city, but this chimera has never prevented the courts from recognizing the practical necessity of conferring upon railroads a general continuing power to be exercised reasonably and within the limits of public necessity; and this is a wise public policy in view of the full

jurisdiction which the courts have to prevent abuse or arbitrary action. As Mr. Justice Shiras said in *Bal. & Potomac R. R. Co.* v. *Fifth Bap. Church*, 108 U. S. 317, 331:

> "In the first place, the authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others. As well might it be contended that the act permitted it to place them immediately in front of the President's house or of the Capitol, or in the most densely populated locality. . . . Whatever the extent of the authority conferred, it was accompanied with this implied qualification, that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property."

If, in the case at bar, it appeared that the location selected on the lake front caused inconvenience or injury to the public or unreasonably interfered with the rights of owners of private property, the railroad could be prevented from constructing the roundhouse. It would be said, as the Court of Appeals of New York said in the case of *Cogswell* v. *N. Y., N. H. & H. R. R. Co.*, 103 N. Y. 10, 25:

> "But it must secure such a location as will enable it to conduct its operations without violating the just rights of others. Public policy indeed requires that in adjusting the mutual relations between railroad companies and individuals, courts should not stand upon the assertion of extreme rights on either side."

It may be said that the facts alleged in the case at bar leave no room for doubt that the place selected for the engine house at Twenty-seventh street will cause the least inconvenience to public and private interests, and that at the same time it will enable the railroad company to operate its road with the highest degree of promptness, efficiency and safety—a matter of vital interest to the whole public.

The defendant advances some additional propositions in support of the judgment below which should be noticed—namely, (1) that although small specific parcels of submerged lands under the waters of Lake Michigan, such as the tract in question, might be granted by the legislature, "no general grant can be made, to be utilized in the discretion of the grantee" (defendant's brief, p. 6); (2) that "the abdication to a railroad company of the election to choose such part of submerged lands as it desires for its private use is leaving such submerged lands under the 'use and control' of the company, as much as a specific grant" (p. 21); (3) that, "if plaintiff in error is right now, it might well have 'elected' to build its round-house in front of the Auditorium, and according to its own statement can now fill out and build engine houses and machine shops anywhere from 16th street to 51st street" (p. 21); (4) that "the discretion to 'elect' what parcels shall be taken is of the very essence of governmental power," which cannot be delegated (p. 24); (5) that "even if the authority to select parcels were validly granted to be exercised in 1852, it could not be exercised now, and if such grant was intended by that legislature, it would be invalid and void" (p. 25); and (6) that "the only possible way in which the legislature could grant these submerged lands would be by expressly reciting in the charter 'lands under Lake Michigan,' and of course, as we have seen, the grant could then be only of small parcels specifically described" (p. 32).

It will be observed that these propositions strike at the roots of the grant contained in the Illinois Central charter, and that, if sound, the conclusion would necessarily follow that the original appropriation of submerged lands was unauthorized, and that the railroad company had no

power whatever under its charter to take any "lands . . . belonging to the state," even in 1852, because no specific lands were described and granted. It will also be observed that the city speaks of *lands* under Lake Michigan; so that the omission of a specific description of submerged lands is all that the argument now hangs on.

The idea that the Illinois Central claims that it was given power to select arbitrarily any submerged lands belonging to the state is utterly erroneous. Its contention is that it is entitled to occupy any vacant lands belonging to the state adjacent to its tracks as located by the statute and ordinance only when and as found to be "*necessary*" for the "construction, completing, altering, maintaining, preserving and complete operation of said road," as provided in section 3 of the charter, if such appropriation of public lands does not interfere with navigation or any other public use or convenience. This is very different from asserting a power to appropriate public property indiscriminately at its will, and "for its private use." The portentous suggestion that the roundhouse could be erected in front of the Auditorium Hotel is disposed of by reference to section 9 of the ordinance of 1852, which expressly imposes the condition that no buildings shall be erected "between the north line of Randolph street and the south line of the said Lake park."

IV.

As to the Lake Front judgment (33 Fed. Rep. 730, and 146 U. S. 387), and in whose favor it operates as res adjudicata.

The city of Chicago contends that the controversy on the merits was definitely settled in the Lake Front case (*Illinois Central Railroad* v. *Illinois*, 33 Fed. Rep. 730, and 146 U. S. 387), and that the question of the power of

the Illinois Central to occupy and fill in submerged lands belonging to the state "is no longer open, because plaintiff's rights are identical at 27th and 16th streets" (defendant's brief, pp. 18, 44). As, in this aspect of the case, the identity of rights is conceded and insisted upon by the Illinois Central Company, it remains to consider what was actually decided in the Lake Front case, and in whose favor the judgment operates, with the effect of the thing adjudged.

In the Lake Front case, the right of the railroad company to fill in submerged lands for the location of depots, station grounds, turn-outs, engine houses, buildings, etc., necessary to the complete operation of its road, was distinctly involved. The proofs pointed out the old shore line of 1852, the line of filling in prescribed by the ordinance of 1852, the line of filling in by the railroad company as it was in 1869 at the time of the passage of the confirmatory act, the line of submerged lands which had since been filled in by the railroad company, with the buildings, including particularly roundhouses, erected thereon, and the piers or docks which had been built into the lake. These lines were shown upon the so-called "Morehouse map," which was expressly made a part of the final decree and is printed in 146 U. S., at p. 413. A *fac-simile* of the map as contained in the Lake Front record is annexed to this brief. In considering the decision, it is necessary to bear in mind the difference between the submerged lands fronting between Randolph street and Park row, in which in 1851 the city seems to have had the riparian rights, and the submerged lands south of Park row, and likewise the difference between the question as to the filling in to the bulkhead lines for railroad purposes and the question as to the con-

struction of piers and docks out into the lake for general commercial purposes. The decree of the circuit court confirmed the right of the railroad company to the submerged lands which had been filled in for railroad purposes as well before as after the act of 1869, whether north or south of Park row. The circuit court, as shown by the final decree printed in the Lake Front record at page 220, expressly decided in favor of the railroad company in respect of the submerged lands on the lake shore fronting on the space between Park row and Sixteenth street which were filled in partly before and partly after the act of 1869; and this decree was *affirmed* by this court except with the following modification, relating wholly to the pier and dock shown on the Morehouse map to have been built in 1885. The opinion and mandate of the court as to this modification will be found at the close of Mr. Justice Field's opinion (146 U. S. at p. 464), viz.:

> "And also to order that similar proceedings be taken to ascertain and determine whether or not the pier and dock, constructed by the railroad company in front of the shore between Twelfth and Sixteenth streets extend beyond the point of navigability, and to affirm the title and possession of the company if they do not extend beyond such point, and, if they do extend beyond such point, to order the abatement and removal of the excess, or that other proceedings relating thereto be taken on application of the State as may be authorized by law."

In the Lake Front case, the state did not contend that the charter contained no grant to the railroad company of submerged lands, nor did the city so contend. On the contrary, the state in its formal pleading filed in that case practically conceded that there was a grant of submerged lands in the charter, but urged that it had been exhausted by the original location. Thus, in the amended information filed June 21, 1887, after the litigation had been pending for several years, the state set forth explicitly what it did

claim, and alleged (record Lake Front case, pp. 121, 140, 141) as follows:

> "That it [the Illinois Central Railroad Company] also asserts that by its charter of 1851 it was empowered to use all the land and domain of the State which it might ever after need and desire for railroad purposes, while the truth and fact is that it has long ago made the location of its road and, as your informant believes, has caused the same to be recorded in the proper offices as the law requires, and *its power to use the public domain* has been long exhausted."

The decision was in the railroad company's favor so far as the point now involved was concerned. The only part of the litigation which went against the railroad company was, first, as to its title to the submerged lands of the outer harbor under the grant in the act of 1869, which it was held had been duly revoked by the act of 1873, and, secondly, as to its right to build piers or docks into the lake, which was limited to the point of practical navigability; and on this latter point the subsequent inquiry has resulted in favor of the railroad company (91 Fed. Rep. 955).

The proof in the Lake Front case showed that a roundhouse and machine shops east of lot 21 had been erected on submerged lands prior to the act of 1869. These were "the roundhouse and machine shops of said company" referred to in that act. It also appeared that, after the act of 1869, the company had filled in additional submerged land between Park row and Sixteenth street out to a new bulkhead line, and that on this newly filled in submerged land it had built a roundhouse. The question then presented was "identical" with the question now presented, namely—whether the railroad company had the right under its charter to fill in submerged land and build a roundhouse thereon—and in addition the separate question whether it had a right to

extend from this solid filling a pier or dock into the lake to the point of practical navigability. To do this filling in between Park row and Sixteenth street either before or after the act of 1869 no consent or ordinance of the city was either applied for or granted. None was ever shown or claimed to exist. In passing upon the question of the right to fill in and reclaim for railroad purposes, the circuit court used language, which, if applied to the case at bar, ought to be decisive of the issue in favor of the plaintiff in error. Thus, after reviewing the proof and referring to the Morehouse map, Mr. Justice Harlan said (33 Fed. Rep. at pp. 756, 757):

> "As to the structures erected by the company east of the exterior line designated by the ordinance of 1852, those built in 1867 may be justified—apart from the confirmatory clauses of the act of 1869—under *the power expressly given to enter upon, take possession of, and use (provided navigation was not thereby interrupted) any lands or waters of the state that were necessary for the complete operation of the road*, for the purpose designated in the charter of the company. . . . *The right of way was located in the open waters of the lake. The state consented, in the charter of the company, that the bed of the lake might be used by the company for a right of way; provided the city assented to the location of the tracks within its limits. The city gave its consent by the ordinance of 1852.* Nothing more is requisite to show that the tracks of the company were legally located on the line designated for a right of way. The use of such ground, in perpetuity, as a right of way simply, does not violate any right of the state, of the city, or of the United States. Upon the same grounds,—the power given to the company in its charter to enter upon and use any land or waters belonging to the state for a right of way of a prescribed width, and for the location of depots, and for the purpose of constructing station grounds, turn-outs, buildings, etc., necessary to the complete operation of its road, and the consent of the city, as manifested in the ordinances of 1855 and 1856,—the occupancy of the two triangular pieces of ground south of Randolph street for the purposes of right of way must be sustained as legal. It would be waste of time to set out the evidence showing that these two pieces of ground are essential to

the operation of the road. Without them, as the ordinances of 1855 and 1856 upon their face indicate, the trains of the company could not conveniently approach its passenger depot, freight-yards, and piers.

"What has been said upon this branch of the case is decisive of the question before the court in respect to the structures erected by the railroad company south of Park row and north of Sixteenth street. The company is shown to be the owner of all the water lots in front of which such structures have been made. The breakwater there constructed was, according to the evidence, necessary to protect the railroad from the waters of the lake; the old breakwater having become insufficient, under the ordinance of 1852, which, it must be remembered, required the shore to be protected by a continuous stone wall or structure of stone masonry, pier-work, or other material, outside of the track of the road, as might be 'expedient,' and as would be of the strength and magnitude requisite to protect the entire front of the city between the north line of Randolph street and its southern boundary against further damage from the action of the waters of the lake. The part of the structure to be erected south of Lake park was required by the ordinance to be commenced and prosecuted with all reasonable dispatch after the acceptance of the ordinance. While the new breakwater is further from the shore than the old one, it does not appear to materially obstruct the use of the navigable waters by the public. As to the large pier at the foot of Thirteenth street, it does not interfere with the public right of navigation. It is wider than was contemplated by the company at the time the plan therefor was submitted to the war department. But such increase of width does not seem to be a matter of any consequence. According to the evidence, none of the structures south of Park Row interfere with the public use of the waters of the lake for purposes of commerce and navigation. Their erection may fairly be referred to the riparian ownership of the company, and to its charter right to occupy and use the land and waters of the state for the purposes defined in its charter, provided, only, navigation is not interrupted; and, as their erection was not forbidden by regulations established under the authority of any statute, no ground is shown for the interference of the court."

The final decree then entered, which was affirmed by this court, except as to the 1885 wharf, provided, among other things (see Lake Front record, pp. 222, 223) as follows:

"That said company is likewise the owner in fee of all the wharves, piers, *and other works* made and constructed by it in the city of Chicago east of its main tracks between the north line of block 23, in fractional section 15 addition to Chicago, and the centre line of Sixteenth street extended, *including* the pier or line of piling represented upon the said Morehouse map to have been built in 1870, and the station grounds lying west of the said pier and contiguous thereto; also of the wharf or pier projecting into the lake from the grounds last mentioned and represented upon the said Morehouse map to have been built in 1885; which said wharves, piers, *and other works* so constructed and so far as constructed by the said Illinois Central Railroad Company as aforesaid are lawful structures and not encroachments upon the domain of the State of Illinois or upon the public right of navigation or upon the property, interests, or estate of the said city of Chicago."

Notwithstanding the above, the city contends that the effect of the Lake Front case is entirely different, viz.:

"But the court found in the 146th U. S. that plaintiff had no right, *under its charter*, to fill in between 12th and 16th streets, where, as here, it was riparian owner, and found that it had no other right than as riparian owner to wharf out, and ordered all structures, not wharves built out properly under its rights as riparian owner, to be abated and removed" (defendant's brief, p. 43).

It is submitted that this statement entirely misconceives what was really decided at circuit and in this court in the Lake Front case.

The ordinances of 1855 and 1856 (printed in the appendix), referred to by Mr. Justice Harlan, relate solely to property in front of the public ground between Madison street and Randolph street, and do not apply in any sense to the lake front between Park row and Sixteenth street, except so far as these two ordinances continued the conditions and restrictions imposed in the ordinance of 1852. The "permission" given by the ordinance of 1856 was a modification of the *conditions* originally imposed as to the "location of the track," and cannot in any just sense constitute evidence that the

railroad company sought the consent of the city as a condition of the exercise of its charter right to occupy submerged lands belonging to the state and situated south of Park row (see *supra*, pp. 15–17).

To repeat, the filling in of the submerged land in front of the property *south of Park row* was done without any ordinance or consent on the part of the city. In other words, the Illinois Central filled in the lake front between Park row and Sixteenth street under the grant in its charter, as it now claims to have the right to do in front of Twenty-seventh street. Its right to do this was affirmed in the Lake Front case. If it had no right to reclaim and use submerged land in front of Sixteenth street in 1852 and before or after 1869, it has no right to do so now in front of Twenty-seventh street. But it is submitted that, unless the Lake Front decision is to be entirely overturned and nullified, the Illinois Central has the same right to fill in at Twenty-seventh street which was adjudged to exist at Sixteenth street.

Moreover, had this small piece of submerged land, then entirely enclosed by this breakwater, been expressly called to the attention of the courts in the Lake Front case, it cannot be doubted for a moment that the circuit court and this court on appeal would have also confirmed the right of the railroad company to build the breakwater and fill in and reclaim the submerged land enclosed by it for necessary railroad purposes. In fact, the point presented in this case is simpler than the principal questions involved in the prior litigation. It is whether the railroad company may fill in the space wholly enclosed by the bulkhead of 1882, and does not, therefore, present any question as to navigable waters, for the enclosed space is not navigable. Having duly enclosed

this tract by a bulkhead or sea wall, may not the railroad company now fill in and render the space useful and available for an essentially public purpose, or to make practicable access to and egress from the water? That is the question; and the case involves no more.

But, in view of the fact that the bulkhead or breakwater entirely enclosing the tract in question was built in 1882 (record, p. 19) and existed when the Lake Front case was commenced and during the whole period of that litigation, the decision in that case should be regarded as *res adjudicata* at least as to the breakwater within the firmly fixed doctrine that "a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented." Mr. Justice Harlan in *Dowell* v. *Applegate*, 152 U. S. 327, 345. See also, *Aurora City* v. *West*, 7 Wall. 82, 96; *Baird* v. *United States*, 96 U. S. 430, 432; *Lumber Co.* v. *Buchtel*, 101 U. S. 638, 639; *Bissell* v. *Spring Valley Township*, 124 U. S. 225, 231. If it be said that the city or the state was not called upon necessarily to bring the encroachments south of Sixteenth street before the court in the Lake Front case and could have reserved each separate construction for a distinct suit, nevertheless the judgment is conclusive as an estoppel because of what was actually decided in the Lake Front case—namely, that the railroad company had the right under its charter to occupy submerged lands belonging to the state. *Last Chance Min. Co.* v. *Tyler Min. Co.*, 157 U. S. 683, 687. Appreciating the effect of these settled rules, the city in its answer "disclaims all intention or design of interfering with the repair or reconstruction of the breakwater at the point named in said bill of complaint" (record, p. 36).

The breakwater, which since 1882 has wholly enclosed the strip in question and protected the city as well as the railroad tracks from the storms of Lake Michigan, may, therefore, be deemed to have been built by authority of law. The only remaining issue is as to the right to fill in this enclosed space. The charter right of the railroad company to fill in to the breakwater or bulkhead line between Park row and Sixteenth street was under substantially similar circumstances adjudged in the Lake Front case. The right now to fill in for a necessary railroad purpose the parcel at Twenty-seventh street must depend upon the existence or non-existence of the same title, namely, the charter grant, and upon substantially the same facts, and the litigation is between the same parties. It is submitted that the force and effect of the thing adjudged is not lessened merely because a different parcel of submerged land is now involved. In *Southern Pacific Railr'd* v. *United States*, 168 U. S. 1, 54, Mr. Justice Harlan said:

> "It is also said that the decision in the former cases concluded, at most, only the question of title in respect of the lands there in controversy. This cannot be correct when the lands in both suits have a common source of title, and the title depends upon the existence or non-existence of the same fact or facts."

So in *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 396, Mr. Justice White said:

> "The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies."

And this should be emphatically so in the case at bar in view of the insistence of the city that the point now presented as to Twenty-seventh street is "identical"

FOLDOUT

(defendant's brief, p. 44), and that the prior decision did in fact "definitely" settle the merits (p. 18).

Washington, January 9, 1900.

WILLIAM D. GUTHRIE,
For plaintiff in error.

BENJAMIN F. AYER,
JAMES FENTRESS,
Of counsel.

APPENDIX.

ORDINANCE OF 1852.

AN ORDINANCE CONCERNING THE ILLINOIS CENTRAL RAILROAD COMPANY.

(Adopted June 14, 1852.)

Be it ordained by the common council of the city of Chicago:

SEC. 1. That permission is hereby granted to the Illinois Central Railroad Company, to lay down, construct, and maintain within the limits of the city of Chicago, and along the margin of the lake within and adjacent to the same, a railroad, with one or more tracks, and to operate the same with locomotive engines and cars, under such rules and regulations, with reference to speed of trains, the receipt, safe keeping and delivery of freight, and arrangements for the accommodation and conveyance of passengers, not inconsistent with the public safety, as said company may from time to time establish, and to have the right of way and all powers incident to and necessary therefor, in the manner and upon the terms and conditions following, to wit: *The said road shall enter said city at or near the intersection of its southern boundary with Lake Michigan, and following the shore on or near the margin of said lake northerly to the southern bounds of the open space known as Lake park, in front of canal section fifteen, and continue northerly across the open space in front of said section fifteen to such grounds as the said company may acquire between the north line of Randolph street and the Chicago river, in the Fort Dearborn addition to said city, upon which said grounds shall be located the depot of said railroad within the city*, and such other buildings, slips, or apparatus as may be necessary and convenient for the business of said company. But it is expressly understood that the city of Chicago does not undertake to obtain for said company any right of way, or other right, privilege, or easement, not now in the power of said city to grant or confer, or to assume any liability or responsibility for the acts of said company.

SEC. 2. The said company may enter upon and use in perpetuity for its said line of road, and other works necessary to protect the same from the lake, a width of three hundred feet, from the southern boundary of said public ground near Twelfth street, to the northern line of Randolph street; the inner or west line of the ground to be used by said company to be not less than four hundred feet east from the west line of Michigan avenue, and parallel thereto.

SEC. 3. The said company may extend their works and fill out into the lake to a point in the southern pier not less than four hundred feet west

from the present east end of the same, thence parallel with Michigan avenue to the north line of Randolph street extended; but it is expressly understood that the common council does not grant any right or privilege beyond the limits above specified, nor beyond the line that may be actually occupied by the works of said company. It is further expressly understood that should any damage or obstruction occur to the harbor of Chicago, clearly traceable to the construction of said works contemplated by sections two and three hereof, then the said company shall be held responsible for the same.

SEC. 4. Permission and right of way are hereby given to the said company to construct and maintain a side track from its main track, beginning at or south of Twelfth street, proceeding through said street, or such line as may be prescribed by the common council, westerly to the South branch of the Chicago river; thence crossing the said South branch by a bridge, or other mode to be approved by the common council which shall not obstruct navigation; thence proceeding northerly to Kinzie street, following as far as practicable the streets nearest to said branch, on such sides of the centre of streets as the common council may prescribe; said track not to be laid west of the west line of Canal street; and also a track leading from the last-mentioned track at or near its intersection with the eastern line of the said South branch of the Chicago river, along the line of said South branch, into Market street, following, as far as possible, the streets nearest the river and on such sides of such streets as the common council may direct; thence along the west line of Market street northerly to Lake street; and they may also extend the track of said road from their track or grounds south of the south pier, across the Chicago river to North Water street by means of a draw-bridge, or other mode which shall not obstruct navigation, and which may be approved by the common council.

SEC. 5. And the said tracks shall be so constructed, furnished and operated as to meet the demands of business upon the streets and lines through and along which they shall run. The said side tracks, stations, depots, turn-outs, switches, turn-tables, buildings and bridges along said line, as well as the motive power to be used and the rate of speed thereon, to be subject to such regulations as the common council may from time to time prescribe for the government of side tracks of railroads within the inhabited portions of the city; said side tracks shall be open to the use of other railroad companies and railroads connecting therewith, upon just and equitable terms, to be agreed upon by the parties interested, and in case of disagreement, by arbitration.

SEC. 6. The said company shall erect and maintain on the western or inner line of the ground pointed out for its main track on the lake shore, as the same is hereinbefore defined, such suitable walls, fences or other sufficient works, as will prevent animals from straying upon or obstructing its tracks, and secure persons and property from danger, said structure to be of suitable materials and sightly appearance, and of such heights as the

common council may direct, and no change therein shall be made except by mutual consent: Provided, however, that the company shall construct such suitable gates at proper places at the ends of the streets, which are now or may hereafter be laid out, as may be required by the common council, to afford safe access to the lake: And provided, also, that in case of the construction of an outside harbor, streets may be laid out to approach the same, in the manner provided by law, in which case the common council may regulate the speed of locomotives and trains across them.

SEC. 7. The said company shall erect and complete within three years after they shall have accepted this ordinance, and shall forever thereafter maintain, a continuous wall or structure of stone masonry, pier work or other sufficient material, of regular and sightly appearance, and not to exceed in height the general level of Michigan avenue, opposite thereto, from the north side of Randolph street to the southern bound of Lake park before mentioned, at a distance of not more than 300 feet east from and parallel with the western or inner line, pointed out for said company, as specified in section two hereof, and shall continue said works to the southern boundary of the city, at such distance outside of the track of said road as may be expedient, which structure and works shall be of sufficient strength and magnitude to protect the entire front of said city between the north line of Randolph street and its southern boundary from further damage or injury from the action of the waters of Lake Michigan, and that part of the structure south of Lake park shall be commenced and prosecuted with all reasonable dispatch, after the acceptance of this ordinance.

SEC. 8. The said company shall not in any manner, nor for any purpose whatever, occupy, use or intrude upon the open ground known as Lake park, belonging to the city of Chicago, lying between Michigan avenue and the western or inner line before mentioned, except so far as the common council may consent, for the convenience of said company, while constructing or repairing the works in front of said ground.

SEC. 9. The said company shall erect no buildings between the north line of Randolph street and the south line of the said Lake park, nor occupy nor use the works proposed to be constructed between these points, except for the passage of, or for making up or distributing their trains; nor place upon any part of their works between said points any obstruction to the view of the lake from the shore, nor suffer their locomotives, cars or other articles to remain upon their tracks, but only erect such works as are proper for the construction of their necessary tracks and protection of the same.

SEC. 10. The said company, in constructing their said line of works in front of Lake park and the public grounds, shall make and keep open, through the same, such culverts or ways as the common council shall prescribe, from the open lake to the space inside of the western line before mentioned, as will afford room for the uninterrupted flow of the water through the same.

SEC. 11. The said company shall lay down, construct, operate and maintain a track, with suitable turn-outs, switches and turn-tables through Twelfth street, or through such other street north of North street as the common council may designate, from their main track on the lake shore, to connect with the said tracks to be constructed by the Chicago & Rock Island Railroad Company, or procure the same to be done, as provided by an ordinance of the city of Chicago, passed April 2, 1852, so soon as the said track on the east side of the south branch of the river shall be completed: Provided, that the city of Chicago shall furnish the right of way to the said company, free of cost, before requiring said track to be constructed.

SEC. 12. Upon the acceptance of this ordinance by the said company (which shall be within ninety days of the passing of the same) a contract or agreement embodying the provisions herein contained, and stipulating that the permission, rights and privileges hereby conferred upon said company shall depend upon the performance on their part of the requirements made upon them by this ordinance shall be executed, sealed and delivered on the part of the city of Chicago by the mayor thereof, and on the part of the Illinois Central Railroad Company by the president thereof, both in usual legal form.

ORDINANCE OF 1855.

ORDINANCE GRANTING RIGHT OF WAY FOR APPROACH TO PASSENGER DEPOT.

(Adopted September 10, 1855.)

Whereas, it has become necessary for the Illinois Central Railroad Company, in order to approach its passenger-house, to curve its tracks westwardly of the line for its track fixed by the ordinance of June 14th, 1852, by crossing said line south of Randolph street, extended and proceeding northwesterly to its said passenger-house; and

Whereas, the said company has presented to this council a petition, accompanied by a map of its depot grounds, showing the tracks and curves as proposed to be made; therefore,

Resolved, That permission be and the same is hereby granted to said company to curve its tracks westwardly of the line fixed by said ordinance, so as to cross said line at a point not more than two hundred feet south of Randolph street, extending and curving said tracks northwesterly as they approach the depot and crossing the north line of Randolph street, extended at a point not more than one hundred feet west of the line fixed by the ordinance aforesaid, in accordance with the map or plat thereof submitted by said company and placed on file for reference.

Upon the following conditions, however:

First. That the said company shall lay out upon its own land, west of and alongside its passenger-house, a street fifty feet wide extending from Water street to Randolph street, and fill the same up its entire length within two years from the passage of this resolution.

Second. That said company shall be restricted in the use of said tracks south of the north line of Randolph street, precisely as is provided by said ordinance of June 14th, 1852, relative to the main and side tracks, and shall permit no cars to stand thereon except as is in said ordinance provided.

Third. When the said company shall fill up under its said tracks south of the north line of Randolph street down to the point where said curves and side tracks commence, and the city shall grant its permission so to fill up its tracks, it shall also fill up, at the same time and to an equal height, all the space between the track so filled up and the lake shore as it now exists, from the north side of Randolph street down to the point where said curves and side tracks intersect the line fixed by the ordinance aforesaid.

Fourth. That the said company shall file with the city clerk its acceptance of the terms of this resolution and its agreement to abide by and perform the said conditions before it shall construct said tracks.

Such acceptance to be under the corporate seal of said company and the signature of the president thereof.

ORDINANCE OF 1856.

AN ORDINANCE GRANTING ADDITIONAL RIGHT OF WAY TO THE ILLINOIS CENTRAL RAILROAD COMPANY.

(Adopted September 15, 1856.)

Whereas, the common council of this city, by an ordinance of the 14th day of June, 1852, granted to the Illinois Central Railroad Company the right to enter and use in perpetuity, for its line of railroad and other works necessary to protect the same from the lake, a width of three hundred feet from the southern boundary of the public ground on Twelfth street to the northern line of Randolph street, the inner or the west line of which ground so to be used by the company, to be not less than four hundred feet east from the west line of Michigan avenue and parallel thereto ; and,

Whereas, the ground thus granted is shown to be too narrow to afford to said company a convenient means of approaching and using a part of their station grounds, between Randolph street and the Chicago river ; therefore,

Be it ordained by the common council of the city of Chicago :

That permission is hereby granted to the said Illinois Central Railroad Company to enter upon and use in perpetuity, for its line of railroad and other works necessary to protect the same from the lake, the space between its present breakwater and a line drawn from a point on said breakwater, seven hundred feet south of the north line of Randolph (street), extended, and running thence on a straight line to the southeast corner of its present breakwater, and thence to the river. Provided, however, and this per-

mission is only given upon the express condition that the portion of said line which lies south of the north line of Randolph street extended, shall be kept subject to all the conditions and restrictions, as to the use of the same, as are imposed upon that part of said line by the said ordinance of June 14, 1852.

Act of 1851.

An Act to reduce the law incorporating the City of Chicago, and the several acts amendatory thereof, into one act, and to amend the same. (Approved February 14, 1851;[1] Priv. Laws Illinois 1851, pp. 132, 141, 142, 147.)

* * * * * *

Chapter IV. *Of the Common Council: Its General Powers and Duties.*

"§ 1. The mayor and aldermen shall constitute the common council of said city. * *

"§ 4. The common council shall have the management and control of the finances, and all property, real, personal and mixed, belonging to the corporation, and shall likewise have power within the jurisdiction of the city, by ordinance: * *

"*Fifty-third.* To preserve the harbor; to prevent any use of the same, or any act in relation thereto inconsistent with, or detrimental to, the public health, or calculated to render the waters of the harbor, or any part thereof, impure or offensive, or tending in any degree to fill up or obstruct the same; . . . to prevent and remove all obstructions therein, and to punish the authors thereof. . . . The harbor of the city shall include the piers and so much of lake Michigan as lies within the distance of one mile thereof into the lake, and the Chicago river and its branches to their respective sources."

Act of 1852.

An Act to amend the charter of the Illinois Central Railroad Company. (Approved June 22, 1852; Laws Illinois 1852, vol. 31, p. 130).

Section 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly*, That the Illinois Central Railroad Company be and is hereby empowered and authorized to locate, construct and operate a lateral branch or track from its eastern branch, as now located at or near Twelfth street in the city of Chicago, to the south branch of the Chicago river, on such terms and conditions and in such manner as may be stipulated between the common council of said city of Chicago and the said company. * *

This act to take effect from and after its passage.

[1] Four days subsequent to charter of Illinois Central Railroad Company.

BRIEF ON BEHALF OF DEFENDANT IN ERROR

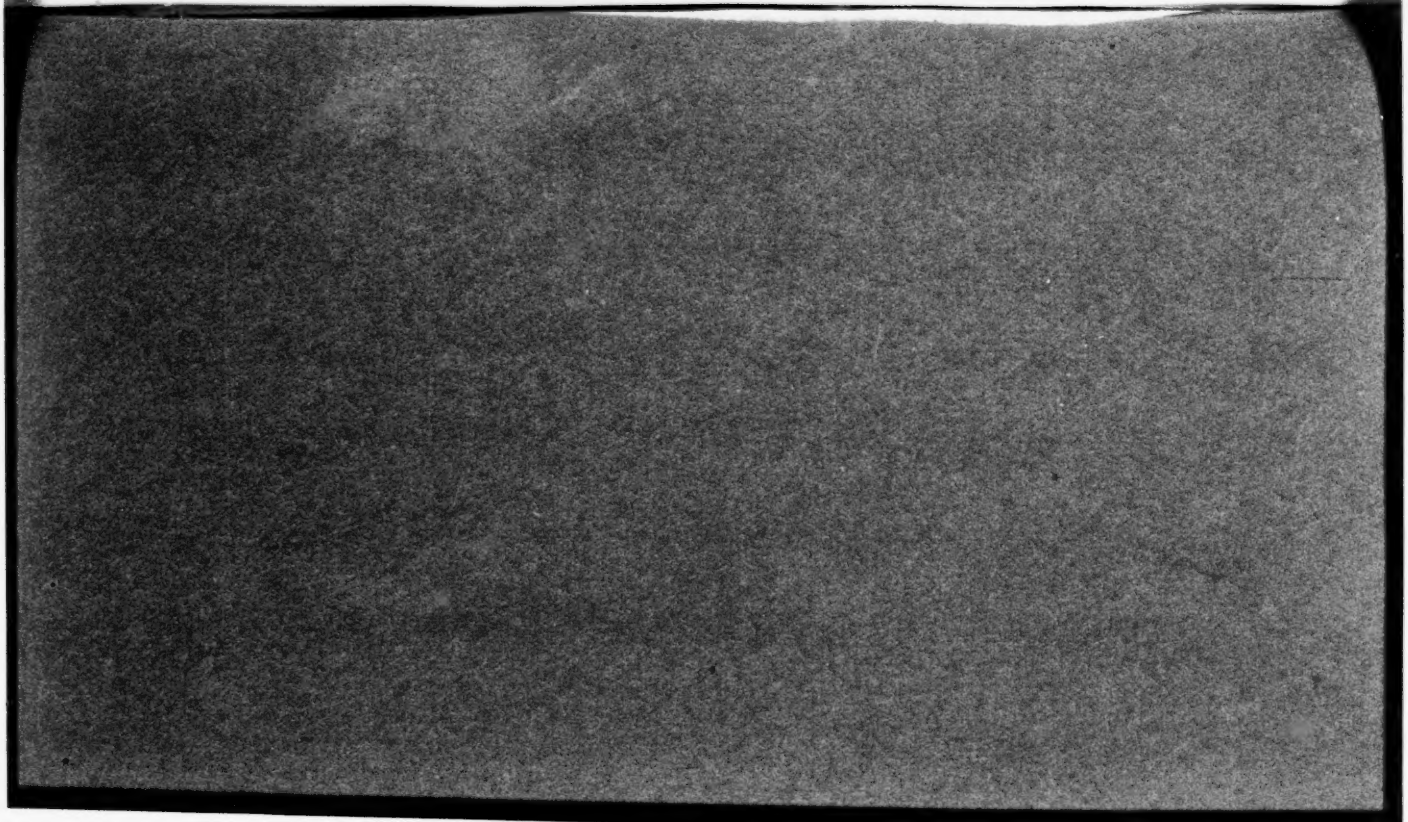
GRANVILLE W. BROWNING,

FOR DEFENDANT IN ERROR.

DEARBORN & WALKER,

SOLICITORS TO THE CORPORATION,

OF COUNSEL.



IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1899.

No. 114.

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE CITY OF CHICAGO,
Defendant in Error.

ERROR TO THE SUPREME COURT OF ILLINOIS.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

MAY IT PLEASE THE COURT:

This is a writ of error to the Supreme Court of Illinois, sued out to secure a reversal of the affirming order of that court in the case of *Illinois Central Railroad Company* v. *The City of Chicago*, 173 Ill., 471.

It is claimed by plaintiff in error that under its charter it has an *irrevocable* contract under which it may fill up and appropriate the ground under the waters of Lake Michigan for its private use, at any time. It attempted to fill in about four acres lying under part of Lake Michigan on which to build a round house, at 27th street, in the City of Chicago, and was prevented from so doing by the city. This interference by the city and the action of the Supreme Court of Illinois in affirming a decree of the Superior Court of Cook County, Illinois, dismissing the bill of plaintiff in error praying for an injunction against such interference, constitutes, it is alleged, an impairment

of that contract within the prohibition of the constitution of the United States.

The bill alleges that the charter gives the company the right to take for its private use any land under Lake Michigan,

> "provided that the use of such lands and waters does not interfere with navigation on Lake Michigan, having reference to the manner in which commerce is conducted thereon [and that such charter] was and is a contract between the State of Illinois and your orator, *is irrevocable*, and confers upon your orator *a vested and continuing right to use the shallow waters and submerged lands of Lake Michigan* for such purposes when such use is reasonably necessary for the business of your orator, provided the same does not interfere with the navigation of the lake, having reference to the manner in which commerce is conducted thereon. And your orator avers that any law of the State of Illinois, or *any judgment, decree or decision of any court or tribunal thereof*, which denies or in any way impairs the right of your orator under the provisions of its said charter to use the submerged land of Lake Michigan for the purpose of constructing and using engine-houses, shops and other buildings thereon, when the same is reasonably necessary, and does not interfere with navigation on the lake, for the construction, completing, altering, maintaining, preserving and complete operation of the road of your orator for the purpose of accomplishing the purposes described and provided by its said charter, *impairs the obligation of the contract created by said charter* between the *state and your orator*, and is in violation of section 10, article 1, of the constitution of the United States, which provided that no state shall pass any law impairing the obligation of contracts." (Rec., 18.)

The bill recites at great length the growth of the Illinois Central Railroad and its increasing business and alleges that it needs a new round house, and

> "under the power, authority and right given and vested in it, under and by its charter, and in the exercise of its rights as riparian owner, your orator *elected and determined* to locate and construct said engine house on land submerged by the shallow waters of Lake Michigan" at 27th street. (Rec., 20.)

It then sets out that the Secretary of War, by letter of August 14, 1897, consented to the rebuilding of the breakwater. The text of the letter (Rec., 21) is that in answer to plaintiff's letter

> "requesting permission to repair certain piers belonging to your company, the war department will interpose no objection thereto."

But in that letter is mentioned no request, made by plaintiff in error, or granted to it, for permission to fill up four acres of Lake Michigan for an engine house. The position of plaintiff in error would seem to be fatally defective at the very threshold of its case. Permission from the United States government to *repair* a *pier* certainly cannot be construed to include the power to fill and occupy four acres of navigable water for an engine house. The letter of the Secretary of War speaks of a *pier*, a structure used in furtherance of commerce, a legitimate structure out into navigable water where it does not interfere with the public right of navigation; but if the plaintiff in error should have made the very different request for leave to fill up the waters in question for a round house, a very different answer would probably have been forthcoming. It is provided in section 8 of plaintiff's charter that

> "nothing in this act contained shall authorize said corporation to make a location of their track within any city without the consent of the common council of said city."

This must be held to mean location of track or other structures, depots, engine houses or otherwise, over the streets, or any part of the lands contiguous to this city, under Lake Michigan, or any other public property over which the police powers of the city extend.

Until the present attempt of plaintiff in error, it has always recognized the necessity of getting the city's consent for any invasion it desired to make upon such public property. In the case of *Illinois Central Railroad Co.* v. *Rucker*, 14 *Ill.*, 353, the Supreme Court decides in favor of plaintiff in error expressly upon the ground that it had obtained the consent of the city council before locating its depot. Reading on page 359:

> *Per Curiam.* 1. That the relator has the right by its charter to locate the road over the premises in question, the City of Chicago having assented."

So the case relied on by plaintiff in error as an early construction of its charter holds that under such charter the city must assent to the taking of any public property within its jurisdiction.

Plaintiff in error did not locate its road and put up its depot in Chicago in the beginning *as a matter of right under its charter*, but only by permission of the city, expressed through an ordinance, directing much of the road to be built on land under Lake Michigan, and then only upon terms that the company would construct and keep open a fifty-foot street on the west line of the depot grounds. If the rights of the railroad were so strictly construed in those early days, when the one idea of the community was to get a railroad at any cost, judge of the temerity of plaintiff in error in asserting forty-eight years afterwards that it has an "irrevocable" contract conferring upon it

> "a vested and continuing right to use the shallow waters and submerged lands of Lake Michigan!"

In 1852 its "vested" right was entirely subject to the will of the city council of Chicago, and the council then granted the right only on hard conditions.

And in the *Rucker* case the Supreme Court of Illinois so construed the contract in terms.

A great part of the plaintiff's argument is directed to the point that the parcel of submerged land attempted to be seized is small and that no private or public rights are endangered or prejudiced thereby. But the size of the tract in question is not material. The principle involved is as wide as Lake Michigan and as deep as its deepest point, because if plaintiff can

> "elect and determine to locate and construct said engine house on [this four acres of] land submerged by the shallow waters of Lake Michigan" (to quote the language of the bill), it can with as much right "elect and determine"

to take an equal width of submerged land throughout its entire length, from 16th street to 51st street (where its line leaves the lake shore). Not only that, but as the filling-in process will cause the lake at its outer edge (now about ten feet deep) to become gradually shallow, it can again, under its "irrevocable" contract, "elect and determine" to seize other widths of 200 feet of land covered by the then shallowed waters of Lake Michigan, and so on to the end of time—and the lake.

BRIEF.

I.

The writ of error must be dismissed for want of jurisdiction. There is no federal question involved.

Winona & St. Peter R. R. v. *Plainview,* 143 U. S., 393.

Water Power Co. v. *Water Commissioners,* 168 U. S., 349; reading on pages 371-4.

171 U.S. 38.
171 U.S. 641
172 U.S. 636
173 U.S. 419.
174 U.S. 91.

N. O. Water Works v. *La. Sugar Co.,* 125 U. S., 18, reading on pp. 30, 38-9.

Bacon v. *Texas,* 163 U. S., 207, reading on page 216.

Central Land Co. v. *Laidly,* 159 U. S., 103, 109, 110.

The control of the City of Chicago over the submerged lands in front of the city under its charter in force at the time plaintiff in error's charter was granted was, if any different, greater than that given by the act of 1872.

Illinois Central Railroad Company v. *Rucker,* 14 Ill., 353, reading on page 356.

II.

The state cannot grant lands under the waters of Lake Michigan to private parties, except in aid of commerce, or to build piers and docks in aid of navigation, unless in particular cases small specific parcels might be granted; but no general grant can be made, to be utilized in the discretion of the grantee.

Illinois Central Railroad Company v. *Illinois,* 146 U. S., 387, reading on pages 451-2-3-5.

Diedrich v. *N. W. U. R. Co.,* 42 Wis., 248.

Water Power Co. v. *Water Commissioners,* 168 U. S., 349, reading on pages 371-373.

Chicago, etc., R. R. v. *Nebraska,* 170 U. S., 57, reading on page 72.

The People v. *Kirk,* 162 Ill., 138, reading on pages 147, 151, 153.

Chicago, etc., Ry. v. *Minnesota,* 134 U. S., 418, reading on page 455.

Illinois Central Railroad Company v. *The City of Chicago,* 173 Ill., 471, reading on pages 485, 487.

III.

The charter of plaintiff in error of February 10, 1851, must be strictly construed. All intendments must be taken against plaintiff in error.

Shively v. *Bowlby,* 152 U. S., reading on page 10.

In the matter of Swigert, 119 Ill., 83, reading on page 89.

Hamilton Gas Light and Coke Co. v. *Hamilton County,* 146 U. S., 258, reading on pages 268-9.

4 Thompson's Commentaries on the Law of Corporations, § 5,661, and authorities cited.

Endlich on Interpretation of Statutes, 1888 Ed., § 354, pp. 495-6.

Raleigh v. *Reed,* 64 N. C., 155.

Sutherland on Statutory Construction, § 378.

N. W. Fertilizing Co. v. *Hyde Park,* 70 Ill., 634.

State v. *Black River Phos. Co.,* 21 L. R. A., 189. reading on pp. 197, 199.

Sage v. *Mayor, etc.,* 47 N. E. Rep., 1096, reading on page 1102.

IV.

If section 3 of its charter gave plaintiff in error the right to fill in and occupy part of the submerged lands under Lake Michigan it could not have been a continuing right.

The discretion as to what parcels of submerged lands can be taken without detriment to public interest is a governmental power, and cannot be surrendered by the legislature.

The legislature of 1851 had not the power to alienate and surrender the discretion of future legislatures in the matter of submerged lands, held by the state in trust.

The claim that such a grant is contained in the charter and that, with the acceptance by plaintiff in error, it constitutes an inviolable contract, is untenable.

Ill. Central Case, 146 U. S., reading on pp. 452-5, 459, 460.

Water Power Company v. *Water Commissioners*, 168 U. S., 349, reading on page 372.

People v. *Kirk*, 162 Ill., 139.

Beer Company v. *U. S.*, 97 U. S., 25.

Cooley on Principles of Constitutional Law, 3d Ed., pp. 112, 334.

In the Illinois Central case, reading on page *460*, this court says:

> "The legislature could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day. Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it. We hold,

therefore, that any attempted cession of the ownership and control of the state in and over the submerged lands in Lake Michigan, by the act of April 16, 1869, was inoperative to affect, modify or in any respect to control the sovereignty and dominion of the state over the lands, or its ownership thereof."

V.

The only grant in the charter, so far as waters are concerned, is of *streams*. The legal status in Illinois of land under streams is different from that of lands under Lake Michigan. The title to the latter is in the state, in trust, to the former, in the riparian owner to the middle of the *stream*. *Streams* cannot be held to include Lake Michigan or its waters.

Illinois Central Railroad Company v. *The City of Chicago*, 173 Ill., 471.

Hardin v. *Jordan*, 140 U. S., 371, reading on pages 381-2.

Fuller v. *Shedd*, 161 Ill., 462, 475, 493.

VI.

The words of the grant are clear and cannot be misunderstood. There is no need of construction.

The grant is of lands and "streams." To prevent any misunderstanding the grant recites later:

> "Provided, that the navigation of *such streams* shall not be interfered with."

The only mention of "waters" is of "such waters," referring, of course, to the waters previously described. The only waters mentioned prior thereto are "streams."

A general description "following a specific enumeration

of objects or things, will be held to include only such things or objects as are of the same kind as those specifically enumerated."

In re Swigert, 119 Ill., reading at the top of page 89.

Where words are plain and no ambiguity arises, no construction is permitted, the words themselves must be taken as written.

Sutherland on Construction of Statutes, § 237.
Martin v. *Swift*, 120 Ill., reading on page 490.
Sullivan, etc., v. *Richardson, etc.*, 33 Fla., reading on page 121.

VII.

If the grant were continuing and were as claimed by plaintiff in error in other respects, plaintiff in error could still only take such parcels as were assented to by the city.

The consent of the city is necessary to prevent plaintiff in error locating its line, switching tracks, round-houses, etc., arbitrarily on the city's front.

Rucker v. *Ill. C. R. R. Co.*, 14 Ill., 353.
Charter of Plaintiff in Error, Sec. 8.

The Lake Front cases expressly recognize the necessity of the consent of the city being given.

146 U. S., reading on pp. 442, 443, 445.

On page 445, the court says:

"The extent to which it (the company) could reclaim the land under the waters was limited by the *conditions of the ordinance.*"

VIII.

The United States Supreme Court in the Lake Front cases, 146 U. S., *supra,* in no respect recognizes any validity in the claim of the plaintiff in error. It decides that the ownership in the submerged lands between Randolph street and Park Row is in the city; that plaintiff in error, in front of section 10, north of Randolph street, and between Park Row and 16th street, is the riparian owner, and that as such riparian owner it has the right to "wharf out" to navigable waters in aid of navigation. It calls the structures in front of section 10, and between Park Row and 16th street, "piers" and "docks," "slips" and "wharves," says they were put there because they are "piers" and "docks," but remands the case to the Circuit Court to ascertain if these "piers" and "docks" interfere with navigation. Nowhere in that decision does the court recognize the right of a riparian owner to fill in the lake in order to build a round-house, or plaintiff in error's right to fill any part of the lake at the present time under section 3 of its charter, or at any time, without the city's consent.

On the contrary, it is distinctly held that the act of 1869 was "inoperative to affect, modify or in any respect to control the sovereignty and dominion of the state" over these submerged lands.

The "discretion" of successive legislatures would be "given away" and "sold" to a greater and more objectionable degree by the charter of 1851, did it provide, as claimed by plaintiff in error, that it could at any time elect to take any land under Lake Michigan for its private uses, than by the act of 1869, expressly held to be "inoperative."

Illinois Central Case, 146 U. S., reading on pages 446, 447, 449, 460 and 464.

IX.

The opinion of Mr. Justice HARLAN, in the Circuit Court, in the Lake Front case, 33 Federal Reporter, 730, raises the question of the power of plaintiff in error to make further encroachments on the land under Lake Michigan without a specific grant from the state. The opinion says, reading on page 758:

> "Whether the railroad company, in its erection of wharves, docks, piers and other structures, has not gone as far as it may go without interrupting the navigation of the lake, or whether it could lawfully erect other structures on the lake without authority from the legislature of the state, are questions which the court is not now required to determine."

X.

If the grant gives a continuing right, the proviso in section 8, that the consent of the city council must be first obtained, is also continuing, and refers not only to new structures contemplated within the old limits of the city of Chicago, but also to any proposed aggression on the lake shore within the present limits of the city. The shore between 25th and 27th streets, is as much within the city limits to-day as was the foot of Randolph street in 1852.

The Rucker case, *supra*, distinctly bases the right of plaintiff in error to build its depot in the lake at Randolph street, because it had obtained a city ordinance to that effect. That was for the reason that that part of the lake was *in the city limits;* so is the foot of 25th and 27th streets to-day.

The city's authority, under existing statutes, is prac-

tically the same as under its charter existing at the time the charter of plaintiff in error was granted.

Rucker v. *Illinois Central R. R. Co.,* 14 Ill., reading on page 356.

Cummings et al. v. *City of Chicago,* 144 Ill., 563, reading on bottom of page 568.

People v. *Hinrichsen,* 161 Ill., 223, reading on page 227.

XI.

Whether or not the harbor, technically defined, extends to 25th street, the lake shore at that point is within the city limits. The road is forbidden to take any land, stream, etc., for its use "within any city" without the city's consent. (Sec. 8, Charter.)

Par. 72, Chapter 24, Starr & Curtis, 1896, provides:

> "The city or village government shall have jurisdiction upon *all waters* within or bordering on the same, to the extent of three miles beyond the limits of the city or village, but not to exceed the limits of the state."

The charter of Chicago, in 1863, still in force, by virtue of sections 11 and 12, chapter 24, Revised Statutes Illinois, gave to the city authority "to preserve the harbor * * * to prevent and remove all obstructions therein, and punish the authors thereof."

Art. 53, Sec. 8, Ch. 4, Laws and Ordinances, 1866.

It also gave to the city powers that *do not depend upon whether the part of the lake in question is technically within the harbor.*

It authorizes the city authorities "to remove and prevent all obstructions in the waters which are public highways of said city, and to widen, straighten and deepen the same."

Art. 2, *ibid.*

The Supreme Court has decided that the powers of the city over the harbor rest on the old charter as well as on the general statutes.

Harmon v. *City of Chicago,* 140 Ill., 374.

As we have seen in the Rucker case, the city's powers under the charter existing in 1851 were still larger in regard to the waters of Lake Michigan and the submerged lands thereunder, so there can be no claim of any federal question by reason of the impairment of any contract by subsequent legislation.

ARGUMENT.

I

It is respectfully submitted that the writ of error must be dismissed for want of jurisdiction. The bill and assignment of errors set up jurisdiction in this court to consider the writ of error because a federal question is involved, that under the charter of 1851, upon acceptance by plaintiff in error, an inviolable contract was entered into, by which plaintiff in error has a vested right to fill in the submerged lands of Lake Michigan to build round-houses, etc., at any point along its right of way where it owns the riparian rights (*i. e.*, from 16th to 51st streets) in said city of Chicago, in its discretion, the only condition being that navigation shall not be affected.

This appropriation of public submerged land, according to plaintiff in error, can be made at any time without notice to state or city, in such parcels as the railroad "elects" to take.

In practice, the notice to the United States government seems also to be dispensed with, since the record shows no application to the government for leave to fill in the four acres of lake for a round-house, but only is an application for leave to "repair" a "pier."

It has long been settled that the impairment of a contract within the meaning of the constitution must be affected by legislative enactment, and by legislative enactment only.

In the N. O. Water Works Case, 125 U. S., reading on page 30, the court says:

> "In order to come within the provision of the constitution of the United States, which declares that no state shall pass any law impairing the obligations of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by the law of the state. The prohibition is aimed at the legislative power of the state, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals.
>
> This court, therefore, has no jurisdiction to review a judgment of the highest court of a state, on the ground that the obligation of a contract has been impaired, unless some legislative act of the state has been upheld by the judgment sought to be reviewed. The general rule, as applied to this class of cases, has been clearly stated in two opinions of this court, delivered by Mr. Justice MILLER: 'It must be the constitution or some law of the state, which impairs the obligation of the contract, or which is otherwise in conflict with the constitution of the United States; and the decision of the state court must sustain the law or

> constitution of the state, in the matter in which the conflict is supposed to exist; or the case for this court does not arise.' *Railroad Co.* v. *Rock*, 4 Wall., 177, 181. 'We are not authorized by the judiciary act to review the judgments of the state courts, because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a state court could be brought here, where the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held.' *Knox* v. *Exchange Bank*, 12 Wall., 379, 383."

In the exuberance of pleading, plaintiff in error sets out in its bill that its alleged contract is impaired by "any judgment, decree or decision of any court or tribunal" of Illinois, but counsel, on pages 11 and 12 of his brief, reduces plaintiffs' claim to the position that the city is interfering with plaintiff's work by virtue of ordinances passed since the city adopted the Cities and Villages Act of 1872, and that, therefore, plaintiff's alleged contract is impaired.

But the city had, in 1851, if anything, greater powers over the lands under Lake Michigan on its front under its charter than it has now, as shown in the Rucker case, in the 14th Illinois, and any privilege granted to plaintiff in error, by its charter, was subject to the powers of the city then existing.

The court says, in the Rucker case, reading on page 356:

> "The charter of the city of Chicago declared the bed and waters of the lake, over and in which the railroad was located, a part of the city and harbor of Chicago, and the common council were empowered to regulate, control and protect the same in their discretion."

As the city limits were extended, in the same way the

rights of the city to "regulate, control and protect the bed and waters" in front of the annexed territory was extended. The provisions of the act of 1872 and the ordinances since adopted in no respect extend or increase the powers of the city in this respect, so that the authority under which the city now resists the encroachments of plaintiff in error upon the public domain held in trust, is the same authority existing at the time the charter of 1851 was granted to plaintiff, and subject to which it was granted. There is, consequently, no impairment of any contract worked by any legislation passed subsequent to the granting of the charter, and therefore no federal question can arise.

This court says further in the N. O. Water Works case, reading on page 38:

> "When the state court decides against a right claimed under a contract, and there was no law subsequent to the contract, this court clearly has no jurisdiction."

Reading on page 39, the court says in the same case:

> "In the present case, the Supreme Court of Louisiana did not, and the plaintiff in error does not pretend that it did, give any effect to the provision of the constitution of 1879, abolishing monopolies. Its judgment was based wholly upon the general law of the state, and upon the construction and effect of the charter from the legislature to the plaintiff company, and of the license from the city council to the defendant company, and in no degree upon the constitution or any law of the state subsequent to the plaintiff's charter. The case cannot be distinguished in principle from the cases above cited, in which writs of error to state courts have been dismissed for want of jurisdiction. As was said in *Bank of West Tennessee v. Citizens' Bank of Louisiana*, above cited, 'The result in this case would have been necessarily the same

> if the constitution had not contained the provision in question.'
>
> Writ of error dismissed for want of jurisdiction."

And so in the case at bar, although plaintiff in error states that its claim rests on the passage of the act of 1872 and the acts of the city thereunder, it is obvious that the decree of the Supreme Court of Illinois is based entirely upon

> "the construction and effect of the charter from the legislature to the plaintiff company" and "in no degree upon * * * any law of the state subsequent to the plaintiff's charter."

And as in that case, so in this,

> "The results in this case would have been necessarily the same" if the law of 1872 had never been passed, or adopted by the city of Chicago.

As to any other ground of federal jurisdiction except that of impairment of plaintiff's alleged contract, the cases are equally conclusive.

Equal protection of the laws is not denied to a person or corporation where the same procedure is applied to the litigant in question as to all others in the same forum.

Tinsley v. *Anderson*, 171 U. S., 101.

The adjudication of a person's claims by the courts of his own state is due process of law.

Morley v. *Lake Shore*, 146 U. S., 162.

II.

The question on the merits now before the court is a simple one and, we submit, was definitely settled in the Illinois Central case in the 146 U. S.

It is whether, as claimed by plaintiff in error, the state

legislature can surrender the governmental control over these submerged lands held in trust, whether it can surrender the legislative discretion of future legislatures in regard to this trust domain?

In the last mentioned case, the court decides, reading on page 460, that the act of 1869

> "was inoperative to affect, modify or in any respect to control the sovereignty and dominion of the state over the lands, or its ownership thereof."

But the act of 1869 was in no respect as obnoxious as surrendering governmental power, as would be section 3 of the charter of 1851, if the force thereof were as plaintiff in error claims.

That act attempts to convey to plaintiff in error the bed of Lake Michigan for the distance of one mile east of its tracks, from about Randolph street to about 16th street, in the city of Chicago. This is a definite tract, away from the regular path of navigation, which goes north and east, and so far as any material results are concerned, aside from its size, its grant to the railroad would be little more objectionable than that of the four acres here in question.

Yet this court rightly characterizes that act as a surrender of governmental power, as an abdication of the general control of the state over the submerged lands. The court says, reading on page 455:

> "The ownership of the navigable waters of the harbor and the lands under them is a subject of public concern to the whole people of the state. The trust with which they are held, therefore, *is governmental* and *cannot* be *alienated*, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the land and waters remaining."

On the same page the court says:

> "Surely, an act of the legislature transferring the title to its submerged lands and the power claimed by the railroad company, to a foreign state or nation would be repudiated, without hesitation, as a gross perversion of the trust over the property under which it is held. So would a similar transfer to a corporation of another state. It would not be listened to that the control and management of the harbor of that great city—a subject of concern to the whole people of the state—should thus be placed elsewhere than in the state itself. All the objections which can be urged to such attempted transfer may be urged to a transfer to a private corporation, like the railroad company in this case."

Yet plaintiff in error claims that by its charter of 1851, it has the *irrevocable* right, in its own discretion, at any time, to elect to take any part of the submerged lands under the lake adjacent to its right of way not specifically included in the decision in 146 U. S., *i. e.*, any part of the lake front of this city from 16th street to 51st street.

That election to decide what parcel shall or shall not be taken, is a governmental power that cannot be abdicated, under this decision. Granted, for the sake of argument, that the legislature can give to plaintiff in error specific parcels of these submerged lands when public interests will not suffer and practical navigation not be interfered with, nevertheless it must be the legislature *at that time* that elects what parcel shall be granted—the surrender of that right to elect cannot be made under this Illinois Central decision.

Reading on page 453, the court further say in that case:

> "The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private

> parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters when parcels can be disposed of without impairment of the public interest in what remains, than *it can abdicate its police powers* in the administration of government and the preservation of the peace."

The abdication to a railroad company of the *election to choose* such part of submerged lands as it desires for its private use is leaving such submerged lands under the "use and control" of the company, as much as a specific grant. In the particular case, the *abdication* claimed to have been made by the legislature in the charter of 1851 is much broader than the *abdication* specifically made in the act of 1869 and condemned as void by this court, because if the charter of 1851 gave the power of election for all time to come as claimed, plaintiff in error could thereunder elect to fill out in front of section ten for a round-house or in front of 16th street or of any other part of the city's front as well as in front of 27th street.

The case in 146th U. S. decided that the city was the owner of the front of the greater part of section 10, but up to that decision, if plaintiff in error is right now, it might well have "elected" to build its round-house in front of the Auditorium, and according to its own statement can now fill out and build engine houses and machine shops anywhere from 16th street to 51st street.

We believe that this Honorable Court has already in the 146 U. S. definitely and finally settled this question, but there are other opinions of this court along the same line, and it is certain that wherever the subject has been approached the Supreme Court has set its seal of condemnation on any such claim as that set up by plaintiff in error.

Thus in the case of *Water Power Company* v. *Water Commissioners,* 168 U. S., where the Water Power Company claimed rights under their charter similar to those claimed by plaintiff in error, the court says, on page 372:

> "There was no contract by virtue of these charters that the companies should always and for all time be entitled to all the natural flow of the water in the river without regard to the right of the state as above mentioned. The claim made by the complainant seems to us most extravagant. The state or any particular subdivision thereof acting under its authority would, if these claims were valid, be forever thereafter prevented from using any portion of the waters of the river for any public purpose unless compensation for such use were first made these plaintiffs. This construction of the meaning of the charters *assumes the power* of a territorial or *state legislature* to *bind future legislatures* in dealing with these *public rights,* and it prevents the latter from providing for the use of any portion of the waters for public purposes of the most important character without first making compensation to the plaintiffs for that use. If we *should assume the validity of an act* of the legislature of *such a character* (which under the decision of this court in *Illinois Central Railroad* v. *Illinois,* 146 U. S., 387, is at least doubtful), *it is clear that we ought not to adopt a construction leading to that result unless the legislative act be plain and beyond all doubt."*

The italics are ours.

We submit that the decision of this court on this point distinctly declares such legislation to be invalid. The court says in the Illinois Central cases, reading on page 460:

> "The legislature could not give away nor sell the *discretion of its successors* in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. * * * Every legislature must, at the time of its existence, exercise the power of the state in the execution of the

> trust devolved upon it. We hold, therefore, that any attempted cession of the ownership and control of the state in and over the submerged land in Lake Michigan by the act of April 16, 1869, was *inoperative to affect, modify* or in any respect to control the sovereignty and dominion of the state over the lands, or its ownership thereof."

To the same effect is the decision of this court in the case of *Chicago, etc., R. R.* v. *Nebraska,* 170 U. S., 57, where it was claimed as here, that the obligation of a certain contract was impaired.

This court says, reading on page 72, that persons making contracts involving public rights, are presumed to know that such subjects cannot be withdrawn from the police power of the legislature. In the Illinois Central case, reading on page 459, the court says:

> "The soil under navigable waters being held by the people of the state in trust for the common use and as a portion of their inherent sovereignty, any act of legislation concerning their use affects the public welfare. It is, therefore, appropriately within the exercise of the police power of the state."

Under this ruling, the state's police power being the same as that in regard to health, safety and similar questions, this Nebraska case is exactly in point.

In the Nebraska case it is said that the city is the agent of the state in the particular matters involved. And so here, the city was made the agent of the state in the matter of the submerged lands in front of Chicago in the city charter in force in 1851, and is made such agent in the law of 1872.

The decision of this court in *Beer Company* v. *U. S.*, 97 U. S., 25, is to the same effect as the Nebraska case, that the police power of the state cannot be surrendered by legislative enactment or contract.

The Supreme Court of Illinois, before its decision in the case at bar, had definitely adopted the position of this Honorable Court on this question.

In the case of *The People* v. *Kirk*, 162 Ill., 138, that court says, reading on page 147:

> "That the governmental control over the lands under Lake Michigan cannot be surrendered by the state, that specific parcels may be granted, but not the discretion of future legislatures."

So on page 151 the court says:

> "No attempt has been made by the legislature to relinquish its governmental powers or place them beyond the power of future legislation."

On page 153 the court says:

> "Grants by the legislature of small parcels are valid so long as they do not undertake to part with governmental power."

As we have seen, the discretion to "elect" what parcels shall be taken is of the very essence of governmental power.

We submit that the argument of counsel for plaintiff in error in no particular meets the issue or in any way detracts from the force of this court's decision in the Illinois Central case.

The opinion of the Supreme Court of Illinois in this case first finds that the construction of the grant contained in the charter is not as claimed by plaintiff, and then says, reading on page 485:

> "That even if the grant were as claimed, it does not follow that the railroad company would have the right, at any time it might see proper, to take and appropriate to itself any of the lands covered by the waters of Lake Michigan, provided only that the navigation of the lake is not interfered with."

and reaches practically the same conclusion as this Honorable Court, on the authority of the decision in the 146th U. S., quoting from the same.

Counsel says that if the legislature granted this four acres, there would be no question; but that is not the issue before the court. There has never been a grant of this four acres. It is the claim of plaintiff in error of the right to elect at any time what parcel or parcels it needs that is at issue.

The city was, by its charter subsisting in 1851, the agent of the state, touching the police supervision of these submerged lands, and its fixing of the location of the tracks and depots of plaintiff in error, by its original ordinance (thus giving the consent required by the railroad charter), might be held to have been a valid exercise of authority and a valid carrying out of the grant to plaintiff in error; but if so, that was all that the legislature had the power to do, and when afterwards plaintiff in error needed other parcels of these submerged lands, under the decision in the 146th U. S., it must have gone to subsequent legislatures for such grants as such legislatures "elected" to make it.

So that counsel's position is untenable; even if the authority to select parcels were validly granted to be exercised in 1852, it could not be exercised now, and if such grant was intended by that legislature, it would be invalid and void.

Counsel's appeal to the doctrine of estoppel, based on the assumption that plaintiff is the object of commiseration in owning this right of way along the lake front, would entertain any one familiar with the city of Chicago, where the immense and unique value of plaintiff's property

has been the envy of all competitors, and far surpasses in every element the right of way of any other railroad company coming into the city.

Counsel attempts to evade the force of the decision in the 146th U. S. by stating that plaintiff in error does not claim arbitrary power, that there must be in each case a *reasonable necessity for the appropriation*, and the locality selected must be *reasonably fit* for the purpose. But plaintiff in error claims the right at all times to "elect" when it is reasonably necessary to *appropriate the trust property* and what parcel or parcels thereof is or are *reasonably fit* for its private purposes, and arrogates to itself the perpetual right to decide, when public convenience and public rights are not interfered with and impaired. But counsel fails to see that it is this very right to make these "elections" that, according to the case in the 146th U. S., cannot be surrendered by the legislature.

To the same effect is the case of *Water Power Company* v. *Water Commissioners*, 168 U. S., *supra*. Reading on page 372, the court says, speaking of an act attempting to bind future legislation in dealing with public rights:

> "If you should assume the validity of an act of the legislature of such a character" (which under the decision in *Illinois Central Railroad* v. *Illinois*, 146 U. S., 387, is at least doubtful) "it is clear that we ought not to adopt a construction leading to this result unless the legislative act be plain and beyond all doubt. We are of opinion that these particular charters of the plaintiffs are not thus to be construed. * * * But there is no language in the acts providing that the companies *shall thereafter and always have the right* to the use of all the natural flow of the water down the river. Nor is such right a necessary and legal consequence of the language used. * * * It is difficult to believe that a legislature would ever grant to individuals or companies rights of that na-

> ture, even if it be assumed it had the power. * * * It cannot be supposed that the legislature meant by any grant of this kind to warrant that for all future time no part of the water that might otherwise naturally flow down the river should ever be used under the authority of the state for any public purpose, without compensating the plaintiffs for that diversion."

So here there is no language in the charter that plaintiff shall "thereafter and always have the right to the use of" any of the submerged lands under Lake Michigan adjoining its right of way that it shall deem reasonably necessary for its private use, and that it can appropriate without, in its judgment, injuring public rights. "Nor is such right a necessary and legal consequence of the language used."

Counsel argues that the Rucker case in the 14th Illinois, the ordinance of the city fixing plaintiff's right of way, and the act of 1869, all show that the construction claimed by plaintiff was the construction put upon the act by the state and city.

But the ordinance passed by the city, so far as the location of the plaintiff's road over the submerged lands is concerned, might as well be held to be the act of the state, by its agent, under the powers granted the city by its charter. On page 356, the court says, in the Rucker case:

> "The charter of the city of Chicago declared the bed and waters of the lake, over and in which the railroad was located, a part of the city and harbor of Chicago, and the common council were empowered to regulate, control and protect the same in their discretion."

The city ordinance provided for the location of the right of way and structures partly over the submerged lands, and the actual issue before the court was whether a mandamus

would issue compelling the court to act in a suit brought by the railroad company to condemn a lot abutting on Lake Michigan. The court distinctly says the city had control of the bed of the lake under the charter, and the location of the road over the lake was valid—"the city having assented." Here again the location was recognized as valid as much on account of the city's powers under its charter as on account of any right of plaintiff under its charter.

We do not think the act of 1869 helps plaintiff's contention. That act reads:

> "Sec. 3. The right of the Illinois Central Railroad Company, under the grant from the state in its charter, * * * and under and by virtue of its *appropriation, occupancy, use and control* * * * in and to the lands submerged or otherwise, lying east of the said line running parallel with and four hundred feet east of the west line of Michigan avenue, in fractional sections ten (10) and fifteen (15), township and range as aforesaid, is hereby confirmed."

Since the words of this act are to be taken against the railroad company as well as those of the charter of 1852, we fail to find any aid and comfort for plaintiff. "The right" of plaintiff confirmed "under the grant from the state in its charter" must be taken to attach to the lands "otherwise" than "submerged," because as we have seen, the submerged lands are held in trust and can only be alienated by express anactment, if at all. "The right" of plaintiff "under and by virtue of its appropriation, occupancy, use and control" in and to the *lands submerged* and lying east of this line is also hereby confirmed, but it must be held to be a ratification by the legislature of the prior taking of the submerged lands by the company.

This court has often held that where a legislature has power to make a particular grant, and parties take without a grant, the legislature can thereafter ratify such taking, and such ratification gives the same right as if an original valid grant had been made.

So, in this case, the ratification of 1869 might have been thought to help the original location of right of way and depots by the city ordinance, over the submerged lands, and particularly to strengthen plaintiff's rights in the very considerable additional piers and docks described at length in the case in the 146th U. S.

The legislature could from time to time have granted these several parcels, and the railroad, having taken them without grants, or with grants of doubtful validity, the ratifying act of 1869 was intended to give plaintiff as good title as an original grant could have done. We believe that this is the proper and inevitable construction of the act of 1869.

Certainly, it will not be held that any language in the act of 1869 could be construed to surrender the governmental control of the state over those submerged trust lands, because this court has said in the 146 U. S. that that act was powerless to accomplish that. If it cannot be held to surrender the public rights directly, how can it be held to be such a construction of the company's charter of 1851 as to work such a surrender of public rights by that charter, thus doing indirectly what this court has held it cannot do directly?

The act will not be held to give plaintiff in error indirectly rights which this court has already decided it could and did not give directly.

But any language in the act of 1869 or in plaintiff's charter that is claimed to affect public rights will be taken

against plaintiff, because it will be held to be the language of plaintiff's agents and promoters and not the language of the legislature.

> "Their language [*i. e.,* the language of charters] is treated as the language of their promoters, who asked the legislature for them, the promoters rather than the legislature being considered as the framers; and when doubt arises as to the construction of that language, the maxim, *'verba cartarum fortius accipiuntur contra proferentem,'* or that words are to be understood most strongly against those who use them, is justly applied. The benefit of the doubt is to be given to those who might be prejudiced by the exercise of the powers which the instrument grants, and against those who claim to exercise them."
>
> *Raleigh* v. *Reid,* 64 N. C., 155.
>
> Endlich on Interpretation of Statutes, 1888 Edition, p. 494.

III.

But we submit that the decision of the Illinois Supreme Court is correct as to the construction of the language in the charter of plaintiff in error, and that that charter must be construed strictly and all intendments must be taken against plaintiff in error.

The cases are unanimous on the point that all such grants must be construed strictly against the grantee.

This very question of the construction of this particular charter has been decided by the Illinois Supreme Court. In the case *in re Swigert,* 119 Ill., 83, the court says, reading on page 89, that this is a charter that requires strict construction.

In Thompson's Commentaries on the Law of Corporations, Vol. 4, Par. 5661, it is said that this rule that a

charter must be construed in favor of the public and against the corporation is "so simple that no man, whether

> lawyer or layman, can misunderstand or misapply it. That which a company is authorized to do by its act of incorporation it may do; beyond that all its acts are illegal. And the power must be given in plain words or by necessary implication. All powers not given in this direct and unmistakable manner are withheld. In such cases, ingenuity has nothing to work with, since nothing can be either proved or disproved by logic or inferential reasoning. If you assert that a corporation has certain privileges,show us the words of the legislature conferring them. Failing in this, you must give up your claim, for nothing else can possibly avail you. A doubtful charter does not exist, because whatever is doubtful is decisively certain against the corporation."

But, as determined by the Illinois Supreme Court, the language of the charter is plain and, upon the issues before the court, needs no construction. Section 3 of plaintiff's charter says that it shall appropriate land not exceeding 200 feet in width for right of way;

> "may enter upon and take possession of and use all and singular any lands, *streams* and materials of every kind * * * for the purpose of constructing station grounds, * * * engine houses, shops and the buildings necessary for the * * * complete operation of the road. All *such* lands, *waters,* materials and privileges *belonging to the state* are hereby granted to said corporation for said purposes; * * * Provided, that nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of said *streams.*"

Plaintiff's counsel discuss quite exhaustively various definitions of the words "lands," "waters" and "streams," but the charter speaks for itself and the several words are

so used therein that they must bear their common meaning.

"Streams" and streams alone, of waters, are affirmatively mentioned.

"Lands" are always mentioned in direct connection with "streams" and "such waters," so "lands" in this charter can only mean dry lands. A grant of land on Lake Michigan never, except by express language, can include the land under the water—the grantee only takes to the water's edge.

The only possible way in which the legislature could grant these submerged lands would be by expressly reciting in the charter "lands under Lake Michigan," and of course, as we have seen, the grant could then be only of small parcels specifically described.

Plaintiff is empowered to enter upon and take "lands" and "streams" *belonging to* the state. If "lands" were used in the broad sense employed in some of the definitions set out by counsel, the legislature would not have gone on to enumerate "streams" and "such waters," it would have been useless.

Moreover, the only "lands" intended to be granted by the charter were the *public lands belonging to the state*, but these submerged lands did not *belong to the state*, were not public lands *in the sense that the state had the right to sell them* or dispose of them at the will of any legislature—they were and are *trust lands*—as decided by the court in the 146th U. S., not *belonging to* the state, but *held in trust* by the state. In addition to public lands *belonging to the state*, the charter granted "streams," no other waters are mentioned or described.

Further in this section 3,

> "All *such* lands, *waters* * * * *belonging to the state* are hereby granted to said corporation for said purposes * * *"

But that phrase, *"such lands, waters,"* must relate to the lands and waters previously mentioned, namely, lands and *streams,* the waters of *streams.*

A general description

> "following a specific enumeration of objects or things will be held to include only such things or objects as are of the same kind as those specifically enumerated." *In re Swigert,* 119 Ill., reading on page 89.

Under the same ruling the "lands" mentioned in both places are the same lands, those *"belonging to* the state," not these submerged lands held in trust by the state.

The state had the right to grant the bed of all streams, even of the Mississippi river, on which it owned lands, to plaintiff under the Illinois decisions, but it holds the bed of Lake Michigan under an entirely different title.

But in the last clause of the section the meaning of the language used is fixed beyond question:

> *"Provided,* that nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of *said streams."*

Is it likely if the legislature intended in the earlier part of the section to grant the bed of Lake Michigan that it would insert a proviso that the navigation of *streams* only was not to be interrupted, thus leaving it within the "election" of plaintiff in error to interrupt the navigation of the lake?

Counsel attempts to explain away the exclusive use of the word "streams" in section 3 upon the hypothesis that

in 1851 it was understood in Illinois and elsewhere that the navigable streams of this state could not be crossed, bridged, etc., by railroads except upon the express authority of the state, and cites various railroad charters, but the argument cannot apply to section 3, because if such were the theory of the legislature in framing the charter of plaintiff in error, this right to cross streams, etc., is provided for specifically in its proper place, in section 10.

> "SEC. 10. Said corporation may construct their said road and branches over or across any *stream* or *water course*, road, highway, railroad or *canal* which the route of its road shall intersect, but the corporation shall restore the *stream* or *water course* * * * thus intersected to its former state * * *"

We thus see that the word "streams" could not have been inserted in section 3 for any other purpose than the plain one of granting *streams* and *streams* only.

The words "lands" and "streams" must be taken in their commonly received sense.

In Sutherland on Statutory Construction we find the correct rule:

> "SECTION 237. INTENT FIRST TO BE SOUGHT IN LANGUAGE OF STATUTE ITSELF. It is beyond question the duty of courts in construing statutes to give effect to the intent of the law-making power, and seek for that intent in every legitimate way. But * * * first of all in the words and language employed; and if the words are free from ambiguity and doubt, and express plainly, clearly and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret 'what has no need of interpretation.' The statute itself furnishes the best means of its own exposition; and if the sense in which words were intended to be used can be clearly ascertained from its parts and provisions, the inten-

tion thus indicated will prevail without resorting to other means of aiding in the construction."

In *Deere* v. *Chapman*, 25 Ill., 498, the court says:

> "Where the words of a statute are clear and unambiguous, they must be taken in their ordinary, natural and most commonly received sense, and * * * statutes in derogation of the common law, not clearly remedial in their nature, should be construed strictly as against those seeking their benefits."

So "streams" doesn't mean "lakes" and charter granting "streams" excludes all other "waters."

In *Martin* v. *Swift, supra*, reading on page 490, the court says:

> "Words used must have their *natural* meaning unless some absurd or injurious consequence would result which the legislature manifestly could not have intended."

Although in the case in the 146th U. S. the claim set up by plaintiff in error was not as broad as that now made, this court took such a position as practically settles the broad claim made here and in so doing itself raised a doubt as to whether the word "streams" could be taken to have any other than its ordinary meaning. On page 444 the court says:

> "Whilst the grant to it (the railroad) included waters of streams on the line of the right of way belonging to the state, it was accompanied with a declaration that it should not be so construed as to authorize the corporation to interrupt the navigation of the streams. *If the waters of the lake* may be *deemed to be included* in the designation of *streams*, then their use would be held equally restricted."

IV.

Even if the grant were as broad as plaintiff claims, and gave it a continuing right to take parcels of submerged land at its election for its railroad purposes, nevertheless, in every case of such appropriation it must first secure the consent of the city authorities. The charter says in section 8:

> "Nothing in this act contained shall authorize said corporation to make a location of their track within any city without the consent of the common council of said city."

The city charter existing at that time

> "declared the bed and waters of the lake, over and in which the railroad was located, a part of the city and harbor of Chicago, and the common council were empowered to regulate, control and protect the same in their discretion." (*Ills. C. R. R.* v. *Rucker*, 14 Ills., 356.)

Reading on page 445 of the Illinois Central case, this court construes plaintiff's right under its charter as being dependent entirely upon the action of the city council.

> "The prohibition upon the company to make a location of its road within any city, without the consent of its common council, necessarily empowered that body to prescribe the conditions of the entry, so far, at least, as to designate the place where it should be made, the character of the tracks to be laid, and the protection and guards that should be constructed to insure their safety. Nor did the railroad company acquire by the mere construction of its road and other works any rights as a riparian owner to reclaim still further lands from the waters of the lake for its use, or the construction of piers, docks and wharves in the furtherance of its business. The extent to which it could reclaim the land under the waters was limited by the conditions of the ordi-

nance, which was simply for the construction of a railroad on a tract not to exceed a specified width, and of works connected therewith."

Language could not be stronger or clearer and plaintiff's claim is utterly dissipated by this finding of the court.

As at that time plaintiff's right "to reclaim the land under the waters was limited by the conditions of the ordinance," so to-day it can make no aggression whatever upon these submerged lands except upon first getting authority from the city council.

Now, as then, plaintiff acquired no right "to reclaim still further lands from the waters of the lake for its use" by the mere construction of its road and other works under its charter. So far as these public rights within the city limits are concerned, plaintiff's power to take now, as it then was, is "limited by the conditions of the ordinance" which the city council may grant. The ordinance from the city is a condition precedent for each individual taking. The fact that the city once allowed it to put its track or a building within the city's jurisdiction does not give plaintiff the right "to redeem still further lands from the waters of the lake."

The claim of plaintiff before the court in the Illinois Central case was not only as a riparian owner, but also under everything it might have by its charter, therefore where the court says that the company acquired no right as riparian owner to reclaim still further lands from the waters of the lake by the mere construction of its road and other works, the force of the finding is that neither as riparian owner or under its charter did plaintiff acquire the right by such construction of its road, etc., to reclaim any further submerged lands.

If at that date plaintiff's rights depended upon the city

ordinance and were limited thereby, still more would that be the case now.

The first ordinance of 1852 fixed plaintiff's right of way and certain yards, etc.; later, in 1855, it wanted more ground for a depot., etc., and another ordinance was passed, imposing certain conditions, among others, that a fifty-foot street must be built and maintained on plaintiff's land.

State of Illinois v. *Illinois Cent. R. Co.*, 33 Fed. Rep., rea ling on page 744.

Plaintiff in error had the same right in 1855 to fill in the parcel of submerged land on which to build its depot, without an ordinance and without conditions imposed by the city, that it has to-day to fill in the four acres at 27th street, but no more.

The general location of the road and its entrance into the city was as much fixed and consented to by the city, through this ordinance of 1852, then, as it is now; yet then, in order to reclaim additional submerged lands, it was required to secure the ordinance of 1855, and to-day to reclaim the four acres at 27th street, it must at least secure an ordinance from the city council, if not in addition thereto a specific grant from the legislature. As in 1852, so in 1897, the extent to which appellant could reclaim the "land under the waters was limited by the conditions of the ordinance" of 1852, and such additional ones as may have been passed since. It is certain that none has ever been passed covering this submerged land at 27th street.

The city's powers as agent of the state in regard to this submerged land at 27th street are the same now as they were over submerged lands in 1852.

We have seen what they were in 1852 by the Rucker case, in the 14th Illinois. By Par. 72, Chapter 24, Starr & Curtis, 1896, edition, it is provided:

> "The city or village government shall have jurisdiction upon all waters within or bordering on the same to the extent of three miles beyond the limits of the city or village, but not to exceed the limits of the state."

As the city limits have been extended from time to time until the whole lake front along which plaintiff's road ran was annexed, *i. e.*, down to about 51st street, we submit that there can be no question that plaintiff would be obliged to get the city's consent to any further reclaiming in front of such annexed territory, precisely as when it desired to reclaim land for its depot in 1855. Certainly, on this point, the decision in the 146th U. S. is conclusive.

V.

Counsel urges that the decision in this case in the 173d Illinois is not consistent with the Rucker case in the 14th Illinois, but there is no disagreement between the two opinions. In the Rucker case the road had the consent of the city authorities; in the case at bar the city authorities resist.

If it were held that the legislature of that day could surrender its own discretion as to the parcels of submerged land to be taken by the plaintiff, in the light of the decisions of this court, before referred to, that right in plaintiff of election could not be a continuing power. No such continuing power to "elect" could be granted by the legislature. Counsel attempts to argue that this power to "elect"

could be granted, and as a continuing power, because it has been decided that under the laws conferring upon railroads the right to condemn, they have a continuing right. But the nature of the right claimed by plaintiff is entirely different. The right to elect, as claimed here, would be a complete surrender of governmental power Plaintiff would be limited only by its own judgment and its own desire for acquisition. It could multiply its tracks along the whole distance from 16th street to 51st street, following simply its own convenience. The right to condemn, on the other hand, involves no surrender of legislative discretion, the course of procedure in the court affords ample safeguards both to public and private interests. There is no surrender of a trust or of discretion in dealing with trust lands.

The argument of the public authorities is not based on the possibility of abuse; it is based on the total want of power in plaintiff to do what it has attempted, on the deliberate endeavor by plaintiff to seize public trust lands without a shadow of right or authority.

In order to draw a comparison between plaintiff's claim in this case and its relation to the law of eminent domain, plaintiff or some other railroad company would have to take possession of private property for its private purposes without compensating the owner and without condemnation proceedings, then the cases might be parallel.

The question as to whether plaintiff might abuse the privilege claimed by it or whether public or private convenience is more or less affected by this particular location of this round-house, or whether the four acres attempted to be seized is more or less valuable than other portions of the lake shore, is not in issue—the question is one simply of power. An illustration of the fallacy of plain-

tiff's argument is afforded by the case of *Revell* v. *The People*, 177 Ill., reading on page 479, where the Supreme Court of Illinois decided that a riparian owner could not run out piers into Lake Michigan for the purpose of increasing his land by the resultant action of the waters and piers. The argument was advanced, there as here, that no one was harmed; that navigation was not affected; that the submerged lands were valueless. The court says:

> "The appellant here owned the premises bordering on the lake, but his title to the premises extended only to the water's edge, and the fee in and to the lands covered by the waters of the lake was vested in the state and held by the state in trust for the people. The fee being in the state, the important question presented is, whether appellant, without a grant or other authority from the state, had the right to go upon the submerged lands and erect the structures complained of. * * * We think it is clear that the act complained of in this information was a trespass upon the lands of the state. * * * But it is said in the argument that the erection of the structures complained of was not injurious to the state, and hence there was no basis for the interference of a court of equity. We do not concur in that view. Although the act complained of was not injurious and was not a public nuisance, still it was an unlawful act of such a character as would properly authorize a court of equity to interfere." * * *

So in this case, although no specific damage is done to public or private interests by this proposed filling and, although the trust land sought to be appropriated would be very useful and valuable to plaintiff, it cannot take the same because it has no "grant or other authority from the state."

But the Revell case goes still further and finds that these illegal appropriations of submerged and even worthless lands (in the commercial sense) are a damage to the

state that should be legally prevented. Reading on page 483, the court says:

> "* * * It is apparent * * * that the construction of the piers was injurious to the state. It is true, the appellant testified that the piers were constructed to prevent erosion and protect his shore bordering on the lake; but it is apparent from the evidence that the effect has been to add new land to his premises. * * * In other words, the erection of the piers has increased appellant's land and diminished the land belonging to the state. This being so, it cannot be said that the construction of the piers was not injurious to the state."

Still more is the artificial filling of this four acres for a round-house "injurious to the state," although in each case the land covered by the shallow waters was of no commercial value.

Plaintiff's counsel attempts to argue that the decision in the 146th U. S. sustains his contention; but, as we have already shown, this court in that case, in plain language, distinctly sustains the position here taken by defendant in error. In that case the court validates the encroachments of plaintiff upon the bed of the lake theretofore made, because they were made under ordinances from the city, and because, where plaintiff had merely taken possession without any ordinance, its taking of such filled ground had been ratified by the act of 1869. As we have seen, that act is not, as counsel claims, to confirm only certain rights of plaintiff *under its charter*, but performs a double service. First, to confirm all prior taking by the company of *land, under its charter*, and to ratify all prior taking of *submerged lands*, without authority.

This court in the prior case not only holds that the act of 1873 is a revocation of the illegal attempt of the legis-

lature to grant one mile of submerged lands, as admitted by counsel, but goes further, as we have seen, and holds that, without such revocation, the act of 1869 was "inoperative to affect, modify or in any respect to control the sovereignty and dominion of the state" over these submerged lands.

The very conclusion of the opinion of this court cited by counsel supports defendant's position. Because it is there directed that the court below ascertain whether the "piers" and "docks" "erected by the company, by virtue of its riparian proprietorship," extend into the lake beyond the point of practical navigability, the same to be "abated and removed" if they do.

But the only right the riparian owner has is to wharf out by piers or docks in aid of commerce and navigation, it is on this theory only that these structures between 12th and 16th streets are "piers" and "docks," that they are not ordered in that case to be at once "abated and removed." But these structures are as much needed by plaintiff in its business as the round-house here contemplated, and if it could not build anything between 12th and 16th streets but piers and docks in aid of navigation, neither can it here, at 27th street, where it is equally the riparian owner. But plaintiff makes no claim that this is a wharf or pier or dock, but openly admits it wants to fill in simply for a round-house, and *disclaims* any rights on the premises as *riparian owner*.

But the court found in the 146th U. S. that plaintiff had no right, *under its charter*, to fill in between 12th and 16th streets, where, as here, it was riparian owner, and found that it had no other right than as riparian owner to wharf out, and ordered all structures, not wharves built out properly under its rights as riparian owner, to be

abated and removed. That question is no longer open, because plaintiff's rights are identical at 27th and 16th streets.

As we have seen, the act of 1869 gave title, by ratification, to all the *land* taken under its charter by plaintiff, and to all *submerged land* held by it by virtue of occupation and prior appropriation in front of sections 10 and 15. It at the same time ratified plaintiff's title to all the *land* taken under its charter and all the *submerged land* theretofore appropriated, without authority, between 12th street and lot 21, practically 16th street (in front of section 22), because it *recognized by its terms and ratified* the occupancy and appropriation by plaintiff of the filled lands within the breakwater of 1869, down to that point.

The act in terms grants to the company all the right of the state

> "in and to the submerged lands constituting the bed of Lake Michigan and lying *east of the tracks and breakwater* * * * of the (company) * * * for the distance of one mile, and between the south line of the south pier (about Randolph street) extended eastwardly and a line extended eastward from the south line of lot twenty-one, south of and near to the round-house and machine shops of said company."

Counsel says in his argument that this round-house and these machine shops were built in 1855 and rebuilt in 1860 on reclaimed submerged lands; that plaintiff's right to construct and maintain them on such lands was adjudged in the case in the 146th U. S.; that there was no right to erect or maintain them there except under the charter of 1851; that plaintiff now seeks to exercise the same power to erect this engine house at 27th street, and that the lake front cases furnish a complete adjudi-

cation of the company's right to do under its charter at 15th street what it now seeks to do at 27th street. But counsel is wrong. The case in the 146th U. S. makes no affirmative finding as to the old filled ground on which these buildings partly stood, but does direct that an inquiry should be instituted as to the ground filled in in 1870, 1882 and 1885, and directs that all of the same as shall be found not to be wharves, properly built under plaintiff's right as riparian owner, shall be abated and removed.

In so far as plaintiff's structures on the ground already filled in 1869 are concerned, they are legalized, and plaintiff's title to that filled ground confirmed, not by any right derived from the charter of 1851 (unless, indeed, such submerged lands were filled at once under that act), but by the ratifying act of 1869. That act in terms recognizes the occupancy of plaintiff of this filled ground and these identical buildings erected thereon, and thereby ratifies the taking of such filled grounds as completely as if in technical language.

It is a complete "legislative ratification" of the appropriation by plaintiff up to that time, of all the filled ground from 12th street to the south line of block 21.

McAuley et al. v. *C., C. & I. C. Ry. Co.*, 83 Ill.,
reading on page 352.

So the question of plaintiff's right under the charter of 1851 was not necessarily before the court as to these 15th street filled grounds, and there is no adjudication in the 146th U. S. that confirms plaintiff's position.

On the contrary, as we have seen, the 146th U. S. distinctly holds that the continuing power to elect to take these trust submerged lands cannot be granted by the legislature.

It is not necessary for the court to determine in this case whether under its charter plaintiff could have legally taken any needed parcel of submerged land when it first located its road, or within a reasonable time thereafter—that issue is not before the court—but the court has in substance already virtually decided in the 146th U. S. that the continuing power to "elect" here claimed could not and cannot be, and was not, granted.

Counsel asks if the title to submerged lands taken at 27th street would not be confirmed as freely and fully as that of the 15th street lands has already been. We answer, undoubtedly yes, if such taking had been ratified by the legislature as was that at 15th street by the act of 1869.

The quotations by counsel at the end of his argument from the opinions delivered by the lower court and that of Mr. Justice FIELD here, do not help him, because in each it is distinctly said that before any part of the submerged land can be taken, the consent of the city is a necessary condition.

In the case in the 146th U. S. no part of the plaintiff's right of way or of the submerged lands, south of 15th street, were in question, but the principles there announced must decide this case, it is respectfully submitted, in favor of the defendant in error.

As we have said, the power of the plaintiff in error under its charter at the first location of its road is not in question. The continuing power claimed now, however, that plaintiff can usurp for all time the powers of the legislature to determine what parcels of this trust property shall be taken for private ends, must be denied.

Mr. Justice HARLAN, in his opinion in the lower court,

himself raises the doubt of the right of the company to this continuing power claimed.

Reading in 33 Federal Reporter, on page 758, he says:

> "Whether the railroad company * * * could lawfully erect other structures on the lake without authority from the legislature of the state, all questions which the court is not now required to determine."

In conclusion we urge that this writ of error should be dismissed, there being no federal question involved.

If, however, we are wrong upon this proposition, we believe that the decree of the Illinois Supreme Court should be affirmed, upon the merits.

If by this charter of 1851 any continuing power were granted to plaintiff in error to "elect" to take from time to time any parcels of the trust property it might need in its business, such taking could be only upon condition that the city of Chicago would first consent as to any of the submerged lands under her jurisdiction.

This consent has never been asked or obtained in this particular case.

But such a grant in plaintiff's charter would be a surrender by the legislature of governmental power, would be an abdication of a trust; to quote the language of the court, the charter of 1851 "was inoperative to affect, modify or in any respect to control the sovereignty and dominion of the state over the lands or its ownership thereof."

Respectfully submitted.

GRANVILLE W. BROWNING,
For Defendant in Error.

CHARLES M. WALKER,
Counsel to the Corporation.
Of Counsel.

No. 114.

Add'l Br. of Browning & Walker for D. C.

Office Supreme Court U. S.
FILED
JAN 23 1900
JAMES H. McKENNEY,
Clerk.

Filed Jan. 23, 1900.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

No. 114.

ILLINOIS CENTRAL RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

THE CITY OF CHICAGO,
DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

ADDITIONAL BRIEF ON BEHALF OF DEFENDANT IN ERROR.

GRANVILLE W. BROWNING,
FOR DEFENDANT IN ERROR.

CHARLES M. WALKER,
COUNSEL TO THE CORPORATION,
OF COUNSEL.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1899.

No. 114.

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE CITY OF CHICAGO,
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

Additional Brief on Behalf of Defendant in Error.

MAY IT PLEASE THE COURT:

Out of excess of caution, we will make some reply to the two briefs filed in answer to our argument, although we respectfully submit that nothing contained in either of such briefs meets the position virtually taken by your Honors in the case in the 146th U. S., and urged by us in our argument, that the plaintiff's charter did not grant to it a roving commission to take any submerged land under the shallow waters of Lake Michigan, from 16th street to 51st street, that it might "elect" to take as being necessary to its business.

And we again urge that there is no federal question involved, and hence plaintiff's writ of error must be dismissed.

I.

As to the question of jurisdiction, the plaintiff's writ of error should be dismissed as not involving a federal question, because the decision in the Supreme Court of Illinois, *is based wholly upon the construction of plaintiff's charter*, taking the language thereof as it stands, and considers no other question and gives effect to no legislation passed subsequent to the granting of plaintiff's charter.

In the case of *Bacon* v. *Texas*, 163 U. S., 207, cited by us in our brief, this court says, reading on page 216:

> "The contract can only be impaired within the meaning of this clause in the constitution and so as to *give this court jurisdiction* on writ of error to a state court, by some subsequent statute of the state, which has been upheld, or effect given it, by the state court."

And further:

> "If the judgment of the state court gives no effect to the subsequent law of the state, and the state court decides the case upon grounds independent of that law, a case is not made for review by this court upon any ground of the impairment of a contract."

To the same effect is the decision in the N. O. Waterworks case, 125 U. S., quoted from on page 15 of our brief, and the other cases cited therein.

The Illinois Court, 173 Ill., 471, construes the language of the grant, deciding that it does not include submerged lands under Lake Michigan, and further decides, reading on page 485, that even if the language included such submerged lands:

> "It does not follow that the railroad company would have the right at any time it might see proper to take and appropriate to itself any of the lands cov-

> ered by the waters of Lake Michigan, provided only, that the navigation of the lake is not interfered with. It is true that the state holds the title to the lands covered by the waters of Lake Michigan lying within its boundaries, but it holds the title in trust for the people, for the purposes of navigation and fishing. The state has no power to barter and sell the lands as the United States sells its public lands; but the state holds the title in trust in its sovereign capacity for the people of the entire state, as held in *People* v. *Kirk*, 162 Ill., 138,"

following with copious quotations from the decisions of this court in the 146th U. S. Nothing else is touched upon or decided in the state court, and following the uniform decisions of this court, the writ of error should be dismissed.

To the same effect, that the writ of error must be dismissed, where only the construction by the Supreme Court of the state of the grant to plaintiff is involved and there is no decision as to the effect of the statute complained of, is the case of *Central Land Company* v. *Laidley*, 159 U. S., 103.

The other point made in our brief that, even if the Supreme Court of Illinois had passed on the question as to whether the contract was impaired by reason of the city of Chicago's adoption of the Cities and Villages act of 1872 and acting thereunder, there would still be no federal question involved, is, we submit, well taken, because in the Rucker case, in which this very charter was involved, the court found what the powers of the city were over the submerged lands, in the light of the rights claimed by plaintiff under its charter.

There being no change in those powers brought about by subsequent legislation, no impairment of any of plaint-

iff's rights could result; the powers of the city, as set out, are held in the Rucker case to have existed at the time plaintiff's charter was granted, and not to have been subsequently enacted.

The Walla Walla case, we submit, is not in point, because, *firstly,* in that case the effect of subsequent legislation was passed on by the state court, and *secondly,* there was a *change in the law.*

Neither of these reasons exist in our case, and the writ should be dismissed.

Mr. Guthrie's argument on page 9 of his reply is not valid, because in the case in the 132 U. S., quoted, the grant to the railroad company was unconditional and it was held that even the re-enactment of the pre-existing law was an impairment, because the company's grant had repealed, as to itself, that law.

In the case at bar there is no such situation because the granting of plaintiff's charter did not change the city's powers a particle, plaintiff's charter being conditional, so far as any rights thereunder within any city were concerned, upon the city's consent; that consent, of course, so far as submerged lands are concerned, being exercised under the city's powers derived from its then existing charter.

It is true that before this district at 27th street was taken into the city, the city would have had no powers, and that if the road had filled in these four acres, the city would perhaps have had no interest or rights in the premises. But the railroad did not take such action, and as the city's boundaries were extended to include 27th street and ultimately 51st street (where the railroad leaves the shore of the lake) if any rights to take submerged land at

those points continued in plaintiff under section 3, the necessity of getting the city's consent before exercising such rights also continued.

When, therefore, the road should attempt to seize new territory at 27th street after annexation, if it had any powers remaining, they must be subject to the same condition of the city's consent.

But, as we have seen, these points were not passed upon by the state court, only the language of plaintiff's charter was construed.

II.

Counsel states that we take the position that plaintiff has the right to take the submerged lands provided the city's consent is obtained. On page 15 of Mr. Guthrie's brief this statement is made, but this is obviously a misinterpretation of the city's position. We take the position and believe, as set out in our brief, that this court has already settled the law in the 146 U. S. to this effect, that plaintiff's charter does not and cannot legally give it the right to elect to take at any time submerged lands under the shallow waters of Lake Michigan adjoining its right of way for its private corporate purposes. For the sake of the argument we go on further and say that even if such a continuing power to elect to take the state's trust lands were sought to be granted by the act such grant was nevertheless conditioned, whenever to be exercised within the city limits, upon the consent of the city council.

We do not concede that there was such a grant, but insist that there was, and could be, none such legally made. We simply say that if any such grant were intended, it was conditional upon the consent of the city council.

Counsel argues that this particular submerged land was outside of the city limits when plaintiff's charter was granted and that upon the passage of its charter plaintiff obtained a vested right to take at any future time that particular submerged land, and that because the city's consent was not then necessary to such taking, the fact that that part of the lake shore afterwards came within the city limits and jurisdiction would not require the city's consent when the railroad, subsequent to such annexation, should "elect" to take this particular submerged land. But even if this continuing power to "elect" could have been and was granted to plaintiff, nevertheless plaintiff's rights in this submerged four acres could not be vested until plaintiff chose to exercise its option to "elect," and if this option to elect were not taken advantage of until after the four acres were within the city limits, then the provision that the consent of the city must be obtained would apply to the four acres.

If the power to elect were continuing certainly the necessity for the city's consent would be so. For instance, if this claimed power had been legally granted and a new city should be started on the shores of Lake Michigan, outside of the city of Chicago, and plaintiff should desire to change or increase its right of way or other facilities in said new city out of submerged lands under Lake Michigan, if such submerged lands existed, it certainly would not be argued that the road could exercise such imagined power without first gaining the consent of the city council as provided in this charter.

Counsel argues that the city's consent was not necessary to the erection of plaintiff's buildings on submerged lands, but in the same breath admits that the city council's consent was obtained for the building of plaintiff's depot on the submerged lands.

It is pertinent to note that he admits that this consent, so unnecessary, was only granted upon hard conditions.

It is also pertinent to note that this depot was built on submerged lands north of the line of Randolph street and in front of lands owned by plaintiff where plaintiff owned most or all the riparian rights, and therefore this consent was not obtained as suggested in another part of counsel's brief, because the city owned the riparian rights.

The experience of lawyers and business men will not lead this court to the conclusion that plaintiff obtained the city's consent uselessly. Counsel has much to say from time to time about contemporaneous construction, and certainly if there is anything in such contention plaintiff's rights are foreclosed by its ordinances obtained in 1852, 1855 and 1856.

Counsel argues that there was no city ownership and therefore no riparian rights south of Park Row, and therefore no consent of the city was obtained, but the consent of the city was obtained for the building of the depot, and that was built where the railroad itself owned the riparian rights, north of Randolph street.

But as we have said before, the question is really a secondary one, there could not be legally granted to plaintiff the power claimed.

III.

As is well known to the court, in the early times in all of our western communities land and water and air were valueless and were parted with with a prodigality which, in many instances, has long since been seriously regretted. Communities were good natured to a degree in allowing corporations and individuals to appropriate public lands and public waters and to make immense profits out of various public utilities without compensation to the public.

In this way it may be that in the early days the Illinois Central from time to time encroached on these trust lands of the state without proper authority, but it would be destructive of public interest to hold that thereby this favored corporation should have thus acquired, as against the state and the City of Chicago, vested rights. As we have seen in our original brief, the right to take any part of these submerged lands can only be granted by legislative act clear as to quantity and locality, granting only specific parcels, as determined by this court.

> "Any attempted cession of the ownership and control of the state in and over the submerged lands in Lake Michigan * * * (by the charter of 1851) * * * was inoperative to affect, modify or in any respect to control the sovereignty and dominion of the state over the lands, or its ownership thereof." * * *

Counsel argues at length as to the value of the road to the community, and we do not seek to lessen this in any particular, but we do not find anything in counsel's reply that will change the decision of this court as we understand it, that no legislature can bind the discretion of future legislatures as to trust lands.

Counsel argues that the act of 1851 gives plaintiff the same right that an act passed this year would to occupy all submerged lands belonging to the state at Chicago, which are necessary for the corporate purposes of the road. In the first place, under the decision of this court in the 146 U. S., we do not believe that this would be a valid grant even if the act were passed to-day, because it is too general and surrenders too much the discretion of the legislature of to-day. *And yet this is the best position that could be claimed for plaintiff in any event. If it had such a charter passed by the last legislature its position would be infinitely stronger.*

The power claimed by plaintiff under the charter of 1851 is not only condemned by this court in the previous decision on pages 453-4-5 as being too great a surrender to a private corporation, but it would also be void if attempted to be granted, because as stated on page 460 of the former opinion,

> "the legislature (of 1851) could not give away, nor sell, the discretion of its successors in respect to matters, the government of which from the very nature of things, must vary with varying circumstances. * * * Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it."

We believe that we have already answered the argument of plaintiff as to the adjudication in the former lake front cases. We believe, as shown in our former brief, that wherever the appropriations by plaintiff of these submerged lands are upheld by this court it is either by reason of such appropriation having been made under authority, at least presumed at the time to be valid and which appropriation had long been acquiesced in, or because such appropriation was subsequently ratified by the act of 1869.

Especially in regard to the submerged lands at 16th street this ratifying act of 1869 cured the original invalidity. There was certainly no decision in the prior case that could in any way be twisted in favor of plaintiff's present contention. The fact that the question as to whether the piers and wharves about 16th street was referred back to ascertain whether they encroached upon navigation, holding that its only right was as riparian owner to wharf out to navigable water, is a complete answer to plaintiff's argument. If such alone were plaintiff's rights in the early days at 16th street, such certainly is the limit of its powers at 27th street to-day.

As we have seen, it may well be that plaintiff was considered to have the right to appropriate submerged lands under this charter immediately upon its coming into force, and it may also well be that through carelessness and good nature plaintiff was permitted to appropriate other submerged lands later, but we do not believe that it can be successfully argued, that on the one hand the power to appropriate was continuing for all time, and on the other hand, that plaintiff now enjoys a vested right, because of the carelessness and good nature of the official or citizen of early days.

If the railroad had filled in this four acres and erected its round-house prior to 1869 and that act ratified such appropriation as it did the appropriation at 16th street, then the cases would be parallel, but because such ratification was necessary in the case at 16th street, so this attempted seizure at 27th street is illegal.

The other brief filed in behalf of the plaintiff argues that because the road has the right to take a strip 200 feet wide for its right of way, therefore it must also have the right to appropriate for depots, engine-houses, etc., but we

contend that under the charter plaintiff acquired no power to "elect" to take any of these submerged lands for either right of way or for buildings, etc., as a continuing power. As we have seen in our original brief, this continuing power, even if it could be validly granted, has not been. The act must be construed against the plaintiff. Plaintiff relies on the Hamilton Gas Light Company case in the 146 U. S., on his proposition that this court has jurisdiction of this case, but aside from the fact that the case is not in point, since there the state court did pass upon the effect of the statutes complained of, it is an unfortunate citation for plaintiff, because it decides that contracts such as the one claimed to have been given to plaintiff by its charter must be most strongly construed against the person enjoying the benefit of the same. Counsel asks on page 13 of the second brief why a distinction should be made against "land" in the first part of section three and "lands" as subsequently recited in the said section. As shown in our first brief, the reason for making a distinction is that in the one case the word stands by itself, in the others it is limited by association in the one case with the word "streams" and in the other with the words "such waters." In the cases cited by counsel in plaintiff's second brief, the words "land" or "lands" are not placed in connection with the words "waters" or "streams" or other words limiting their meaning.

Counsel on page 18 discuss the decision in 146 U. S., and state that thereby the possession of the railroad to any of its lands actualiy occupied was not disturbed.

But as we have seen, this fact is because of the ratification of the previous takings contained in the act of 1869.

We respectfully submit that counsel mistakes the decision in 146 U. S. in another particular. He states

that that decision only found that the general grant contained in the act of 1869 was invalid, because revoked by the act of 1873, but as we have shown on page 460 of that opinion, this court distinctly says that without the revoking act of 1873 that part of the act of 1869 is void, as attempting to surrender power. As we have seen, the surrender of public authority and discretion claimed to have been made by this charter is much greater and more serious than he "abdication" in the act of 1869, which this court says "is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public."

It is claimed that this charter is an "abdication" of the general control of the state over the submerged lands from 16th street to 51st street.

We submit that there is no discrepancy between the decision of the state court in the Illinois Central case and the decision of that court in the Boulevard case, *The People* v. *Kirk*, 162 Ill., 138. In the latter case the park commissioners are agents of the state carrying out the public functions as such agents.

The state can utilize these submerged lands for the benefit of the public where it might not legally grant them to a railroad corporation to be used for corporate purposes. Moreover the decision of the state court in this matter is based on the prior decision of this court, and if the decision in the Kirk case is wrong that fact does not affect the decision in the case at bar.

In their second brief plaintiff's counsel rely on an imagined discrepancy between the Rucker case in the 14th Ill. and the case in the 173d Ill., the case at bar. We do not believe that any discrepancy exists, but if any there

be, the last decision undoubtedly governs. But as we have before shown, it might be held that plaintiff could take possession of submerged lands immediately upon the granting of its charter, although at the same time the grant as claimed to be continuing or perpetual might be held to be utterly void for that reason.

Counsel also lays a good deal of stress upon the act of 1869 as being a construction of the charter of 1851 favorable to their contention. But that act of 1869 has already been construed by this court as void except as ratifying certain specific acts of plaintiff, and we do not know of any legislation which more loudly calls for the principle of strict construction against the promoter, ruled by the cases cited in our first brief, than this act of 1869. As we have argued there the claimed powers in the charter of 1851 are void and are more obnoxious to public rights than the general grant of the act of 1869, already definitely condemned by this court.

In discussing the decision in the 33 Fed. Rep. and the 146 U. S., counsel do not note the explicit condemnation in both of acts attempting to surrender governmental power and the expressed doubt whether any right there may have been had not already been exhausted, and whether the right to take under the charter of 1851, if it ever existed, were continuing.

In conclusion, we believe that the decision of this Honorable Court should be rendered for the defendant in error by the dismissal of the writ of error, the Supreme Court of Illinois not having passed on anything but the construction of the charter of plaintiff. Failing this, the charter should be construed, as we believe it already has been by this court, as not giving the continuing right to

take the trust lands of the state, thus working a surrender of governmental power.

Respectfully submitted.

GRANVILLE W. BROWNING,
For Defendant in Error.

CHARLES M. WALKER,
Counsel to the Corporation,
Of Counsel.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* CHICAGO.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 114. Argued January 24, 25, 1900. — Decided March 12, 1900.

The charter of the Illinois Central Railroad Company authorized it to "enter upon and take possession of and use all and singular any lands, streams and materials of every kind for the location of depots and stopping stages for the . . . complete operation of said road;" and granted to it "all such lands, waters, materials and privileges belonging to the State." A subsequent ordinance of the city of Chicago, passed in pursuance of authority granted by the legislature, forbade the driving or placing of any piles, stone, timbers or other obstruction in the harbor of the city, without the permission of the commissioner of public works. *Held:* that a Federal question was presented whether this ordinance impaired or interfered with the charter of the railroad company.

Held further, that, under its charter, the railroad company had no right to take possession of lands submerged beneath the waters of Lake Michigan. *Held*, also, that the "waters" granted to the railroad company in the second part of the granting clause, were restricted to the "streams" mentioned in the first part, and did not include the waters of Lake Michigan.

Under another section of the charter, providing that the corporation should not locate its track within any city without the consent of the common council, *held*, that this proviso was not confined to the main track of the road, but included its depots, engine houses and necessary track approaches to the same.

This restriction was not limited to the city as bounded at the date of the charter, but applied also to territory subsequently included within the city limits.

THIS was a bill in equity instituted by the Illinois Central Railroad Company in the Superior Court of Cook County, to obtain an injunction restraining the city of Chicago from interfering with the exercise of the right of the railroad company to fill in, for railroad purposes, certain lands submerged by the shallow waters of Lake Michigan in front of property owned by the railroad company, in fee, and situated between Twenty-fifth and Twenty-seventh streets in said city. The purpose of the railroad company in reclaiming the land was to erect thereon an engine house and locomotive stalls necessary to the operation of the road.

Statement of the Case.

The case was heard upon bill, answer, cross bill and demurrer to cross bill, in which were set forth substantially the following facts, as recited in the opinion of the Supreme Court, 173 Illinois, 471:

By an act of Congress approved September 20, 1850, 9 Stat. 466, c. 61, "the right of way through the public lands was granted to the State of Illinois for the construction of the railroad from the southern terminus of the Illinois and Michigan Canal to a point at or near the junction of the Ohio and Mississippi rivers, with a branch of the same to Chicago, on Lake Michigan, and another via the town of Galena, in said State, to Dubuque, in the State of Iowa, with the right, also, to take the necessary lands, waters and materials of earth, stones, timber, etc., for the construction" of the railroad. The act also granted to the State of Illinois, for the purpose of aiding and making the railroad and branches above named, every alternate section of land designated by even numbers, for six sections in width, on each side of the railroad and branches. By the act it was further provided that the railroad and branches should be and forever remain a public highway for the use of the Government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States.

The company was created, organized under and now exists, by virtue of an act of the legislature of the State of Illinois approved February 10, 1851, entitled "An act to incorporate the Illinois Central Railroad Company," Private Laws of 1851, p. 61, and by its charter it was authorized to survey, locate, construct, complete, alter, maintain and operate a railroad, with one or more tracks or lines of rail, from the southern terminus of the Illinois and Michigan Canal, to a point at or near the junction of the Ohio and Mississippi rivers, with a branch of the same into Chicago, on Lake Michigan, and also a branch via the city of Galena to a point on the Mississippi River opposite the town of Dubuque, in the State of Iowa. By section 3 of its charter it was provided as follows: "The said corporation shall have right

of way upon, and may appropriate to its sole use and control for the purposes contemplated herein, land not exceeding 200 feet in width through its entire length; may enter upon and take possession of and use all and singular any lands, streams and materials of every kind, for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turnouts, engine houses, shops and other buildings necessary for the construction, completing, altering, maintaining, preserving and complete operation of said road. All such lands, waters, materials and privileges belonging to the State are hereby granted to said corporation for said purposes; but when owned or belonging to any person, company or corporation, and cannot be obtained by voluntary grant or release, the same may be taken and paid for, if any damages are awarded, in the manner provided in 'An act to provide for a general system of railroad incorporation,' approved November 5, 1849, and the final decision or award shall vest in the corporation hereby created all the rights, franchises and immunities in said act contemplated and provided; . . . *Provided*, that nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of said streams."

The bill also avers that the company constructed its line of railroad within the then limits of the city of Chicago in the year 1852, and completed its railroad between the *termini* named in its charter, in the State of Illinois, in the year 1857; that the total number of miles of its railroad in the State, upon completion, was 706; that at the time of the construction of its railroad, in 1852, into the city of Chicago, the southern limits and boundary of the city extended only to Twenty-second street; that in 1852 it constructed its line of railroad immediately along the shore and partly over the shallow waters of Lake Michigan from Fifty-first street to Twenty-second street, then the southern boundary of the city, and that its railroad was constructed into the city of Chicago through the waters of Lake Michigan, pursuant to an

ordinance of the city; that its railroad within the limits of the city was constructed on piling set in the open waters of Lake Michigan east of the shore; that between Park Row and Randolph street the distances in a direct east and west line between the shore line and the inner or west line of the piling on which the railroad of the company was constructed through the open waters of Lake Michigan varied from 5 feet at Park Row to 310 feet at Madison street, and that the depth of the water along the line of piling between the points above named varied from 2½ to 9½ feet; that the company now owns or controls by lease, and is now operating under one management, the whole of the trunk line as one continuous line from New Orleans, through the States of Louisiana, Mississippi, Tennessee, Kentucky and Illinois, into the city of Chicago; that it controls, by lease or otherwise, under the same management, many other lateral lines in the States above named, and also in the States of Wisconsin, Iowa, Minnesota and Dakota, which connect with and are tributary to the parent line of the company; that the number of miles now owned or controlled by the company under one management exceeds 4600.

It is further alleged in the bill that the city of Chicago is the business centre of the various lines which constitute the system owned by the company; that the business carried on over the terminal tracks and facilities of the company within the present limits of the city of Chicago is so great and so constantly increasing that the whole of its right of way and lands contiguous thereto, within said limits, are used to their utmost capacity as yards, shops, depot grounds, side tracks, switching tracks, storage tracks, delivery tracks, team tracks and other structures, all of which are absolutely necessary as terminal facilities to enable the company to carry on and conduct its business as a common carrier of freight and passengers, and that all the tracks, structures and appliances of its terminal facilities are necessary and essential to enable the company to carry on its business; that the business of the company as a common carrier greatly increases from year to year, and that it has so continued to increase that its terminal

facilities in the city are not wholly adequate for the purposes and uses prescribed and intended by its charter. The bill sets out in detail its business and its increase from year to year, and alleges that its terminal facilities in the city of Chicago have been found to be wholly inadequate to enable the company to carry on its business; that in order to meet the increased business necessities and requirements of the company it is absolutely necessary that the company should construct, operate and use an engine house 316 feet in diameter, and containing forty stalls, together with a machine shop, turn table, coal chute and other structures; that it has no engine house whatever at which it is practicable for its engines to be overhauled and fitted for operation; that it has no land whatever unoccupied by other necessary tracks and structures, which is either sufficient in dimensions or suitably located, upon which to locate and construct an engine house of the necessary dimensions and capacity, with the necessary appurtenances thereto, required and necessary for the business of the company, and that in order to build such engine house and the appurtenances it is necessary to construct the same upon land covered by the shallow waters of Lake Michigan, at a point between Fifty-first street and Eighteenth street.

It is also set up in the bill that, in 1852, at the time of the construction of the road within the city of Chicago, it purchased certain lands lying between Twenty-fifth and Twenty-seventh streets, bordering on the shore of Lake Michigan; that in the deeds the shore of Lake Michigan was designated as the east boundary line thereof, and that the company, as owner, was vested with all the riparian rights and privileges incident to the ownership in fee of the shore land; that in the year 1882 it constructed a breakwater or bulkhead in the shallow waters of Lake Michigan, the same being located and constructed in front of the land which the company purchased in 1852, above referred to, the east and west line of the breakwater on the north extending from a point on the shore continuous with the northern boundary of the land conveyed to the company in 1852, and extending to a point 200 feet easterly from the shore line, running thence southerly

a distance of 781 feet, and thence westerly to the shore line, a distance of 325 feet; that the breakwater built by the company in 1882 was constructed on two rows of piling driven into the bed of Lake Michigan, and the space between the rows of piling was filled in with stone, in order to strengthen the breakwater and enable it to withstand the force of Lake Michigan during periods of storm; that all the shore land embraced within the lines of the breakwater now is, and ever since the year 1852 has been, owned in fee simple by the company, and that it is entitled to all the riparian rights and privileges incident to the ownership in fee of the shore land; that the superficial area of the land covered by the shallow waters of Lake Michigan lying within the lines of the breakwater and the shore line of Lake Michigan is 195,200 square feet, or 4.48 acres; that the superficial area of the ground necessary for the construction of the engine house, machine shop, coal chute and other necessary structures appurtenant thereto is 168,426.9 square feet, or 3.86 acres.

The bill further states that in the year 1894 a part of the breakwater referred to as having been constructed by it in the year 1882 was destroyed by a storm on Lake Michigan; that it being necessary, to enable the company to carry on and conduct its business, that an engine house of sufficient capacity to meet its necessary requirements and demands in conducting its business and to accomplish the objects for which the company was chartered, be constructed and erected at a reasonably suitable and proper location, and it being necessary that such engine house should be erected and constructed upon the lands submerged by the shallow waters of Lake Michigan lying in front of land on the shore of Lake Michigan owned in fee simple by the company, the company caused plans to be made, as before stated, for an engine house 316 feet in diameter, and containing forty stalls or compartments, and under the power, authority and right given and vested in the company by its charter, and in the exercise of its rights as riparian owner, it elected and determined to locate and construct said engine house on land submerged by the shallow waters of Lake Michigan lying within the limits of

the breakwater, and to repair the breakwater and fill in the submerged lands lying within the limits of the breakwater, for the purpose of constructing thereon said engine house and the necessary appurtenances thereto; that the breakwater does not in any way interfere with the navigation of Lake Michigan; that the Secretary of War gave his consent to the repair of the breakwater; that the commissioner of public works of the city of Chicago also gave his consent to the repair; that the company placed upon the ground large quantities of material for repairing the breakwater, the filling in of the lands covered by the shallow waters of Lake Michigan embraced within the lines thereof, and for the construction of the engine house and appurtenances thereto on the lands to be filled in; that it repaired the breakwater by driving two rows of piling, and filled in a large part of the space between the exterior and interior line of piling with stone, for the purpose of enabling the breakwater to withstand the force of Lake Michigan; that the company was prevented by the police force of the city of Chicago, acting under the orders and direction of the mayor, from completing the work; that the city of Chicago, without right or authority, interferes with and prevents the company from filling in the lands within the lines of such breakwater.

The answer of the city set up its charter and authority under an act of the General Assembly of the State of Illinois, entitled "An act to provide for the incorporation of cities and villages (approved April 10, 1872, in force July 1, 1872)," and the several acts amendatory thereof and supplementary thereto, and that, among other things, it was "empowered to regulate and control the use of public landing places for docks and levees; to control and regulate the anchorage, moorage and landing of all water crafts and their cargoes; to make regulations in regard to the use of harbors, and to appoint harbor masters and define their duties, and that in the exercise of such power this defendant has, through its police power, prevented the said complainant hitherto from filling up the said lake and intruding upon the navigable waters thereof, and that all the acts and doings complained of as done and per-

formed by this defendant, its officers, agents and employés, have been done strictly in the line of its duty in that behalf for the purpose of protecting its own rights and the rights of the public generally, in the premises, so as to prevent obstructions in the harbor and the seizure and appropriation by the complainant of the bed and navigable waters of the said lake;" and also pleaded the decision of this court in *Illinois Central Railroad Co.* v. *Illinois*, 146 U. S. 387, as *res judicata* of all the questions in controversy. The cross bill prayed a counter injunction against any interference by the railroad company.

Upon a hearing upon these pleadings the Superior Court denied the injunction demanded by the railroad company and dismissed its bill. On appeal the Supreme Court affirmed this decree. 173 Illinois, 471. Whereupon the railroad company sued out a writ of error from this court.

Mr. William D. Guthrie for plaintiff in error. *Mr. Benjamin F. Ayer* and *Mr. James Fentress* were on his brief.

Mr. Granville W. Browning for defendant in error. *Mr. Charles M. Walker* was on his brief.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

The Supreme Court of Illinois disposed of this case upon two grounds: (1) That the power given by the charter of the Illinois Central Railroad Company of February 10, 1851, to "enter upon and take possession of and use all and singular any lands, streams and materials of every kind, for the location of depots and stopping stages for the . . . complete operation of said road," and the grant to said corporation of "all such lands, waters, materials and privileges belonging to the State," did not include lands covered by the waters of Lake Michigan. (2) That, even if the grant were broad enough to include the waters of the lake, it did not follow that the railroad company would have the right, at any time it might see proper, to take and appropriate to itself any of the lands cov-

ered by such waters, provided only that the navigation of the lake was not interferred with.

1. The ultimate jurisdiction of this court is invoked by the allegation of the bill that the above provision of the railway's charter was and is an irrevocable contract between the State of Illinois and the complainant, conferring upon it "a vested and continuing right to use the shallow waters and submerged lands of Lake Michigan for such purposes, when such use is reasonably necessary for the business of your orator; provided, that the same does not interfere with the navigation of the lake, having reference to the manner in which commerce is conducted thereon"; and that "any law of the State of Illinois, or any judgment, decree or decision of any court or tribunal thereof, which denies or in any way impairs its right to use the submerged land of Lake Michigan for the purpose of constructing and using engine houses, shops and other buildings thereon, etc., impairs the obligation of the contract created by said charter," etc.

The answer of the city avers that, under an act of the General Assembly of the State, approved April 10, 1872, it was empowered "to regulate and control the use of public landing places for docks and levees; to control and regulate the anchorage, moorage and landing of all water crafts and their cargoes; to make regulations in regard to the use of harbors, and to appoint harbor masters and define their duties, and that in the exercise of such power this defendant has, through its police power, prevented the said complainant hitherto from filling up the said lake and intruding upon the navigable waters thereof;" and that the city was also empowered to regulate its police, and pass and enforce all necessary police ordinances; and that in pursuance of this authority the city council made and established an ordinance (793) that "no person or persons shall drive or place or cause to be driven or placed any pile or piles, stone, timbers earth or other obstruction in the harbor of the city without the permission of the commissioner of public works," etc.

This was the only authority claimed in the answer, but as all this legislation was subsequent to the charter of the railroad

company, the city now sets up in support of its motion to dismiss for want of a Federal question that it was provided in section eight of the railroad's charter of 1851, that "nothing in this act contained shall authorize said corporation to make a location of their track within any city, without the consent of the common council of such city," and that this section operates as a restriction upon the power of the railroad to locate its track, or other structures, depots, engine houses or otherwise, over any lands contiguous to the city under Lake Michigan, or any other public property over which the police power of the city extends.

It is also insisted that the city had, in 1851, even greater powers over the submerged lands on its lake front under its charter than it has now; but the only support for this contention lies in an amended charter of the city of Chicago, passed February 14, 1851, four days *after* the charter of the Illinois Central Railroad Company was adopted. As this was a subsequent act, it is impossible to argue from it that the police power of the city at the date of the charter was as ample as that conferred by the act of April 10, 1872, set up in the answer. The extract to which attention is called by counsel, from the opinion of the Supreme Court of Illinois in *Illinois Central Railroad* v. *Rucker*, 14 Illinois, 353, 356, to the effect that under the charter of the city of Chicago the common council was empowered to regulate, control and protect the bed and waters of the lake as a part of the city of Chicago, may have been, and probably was, based upon the act of February 14, 1851, and, in any event, is too indefinite to be made the basis of any adjudication as to the power of the common council.

We have examined the first charter of the city of Chicago, adopted March 14, 1837, and the amendments thereto, down to the charter of February 14, 1851, and find nothing prior to the last-mentioned date defining the powers of the common council over the waters of Lake Michigan adjacent to the city, or anything from which it can be argued that the authority of the common council, with respect to the harbor and adjacent waters, was as ample as that conferred by the acts of the Gen-

eral Assembly subsequent to the chartering of the railroad company.

The question then is reduced to this: Giving to the charter of the railroad company the broadest construction claimed by it (and, in determining the existence of a Federal question, we are bound to do this), may it not be reasonably insisted that, under the act of 1872 and ordinance No. 793, that "no person or persons shall drive or place or cause to be driven or placed any pile or piles, stone, timbers, earth or other obstruction in the harbor of the city without the permission of the commissioner of public works," the right of the railroad company "to enter upon and take possession of and use all and singular lands, streams and materials of every kind for the complete operation of the road," is impaired? We think it may. Without determining the effect of such ordinance, the question whether it impairs the charter of the company, giving to that charter a broad construction, is fairly open to contention. *Bacon* v. *Texas*, 163 U. S. 207, 216; *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 5, 10. The claim is certainly not a frivolous one. In determining the existence of a Federal question it is only necessary to show that it is set up in good faith and is not wholly destitute of merit. Said Chief Justice Chase in *Millingar* v. *Hartupee*, 6 Wall. 258, 261, speaking of the validity of an authority exercised under the United States: "Something more than a bare assertion of such authority seems essential to the jurisdiction of this court. The authority intended by the act is one having a real existence, derived from competent governmental power. If a different construction had been intended, Congress would doubtless have used fitting words. The act would have given jurisdiction in cases of decisions against claims of authority under the United States. . . . If a right were claimed under a treaty or statute, and on looking into the record it should appear that no such treaty or statute existed or was in force, it would hardly be insisted that this court could review the decision of a state court that the right claimed did not exist." So in *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79, we held that the bare averment of a Federal question is not always sufficient; that such aver-

ment must not be wholly without foundation, since if it were otherwise a Federal question might be set up in almost every case, and the jurisdiction of this court invoked simply for the purpose of delay.

But as we are of opinion that the Federal question in this case was properly set up in the record, and is not destitute of merit, the motion to dismiss must be denied.

2. Upon the merits, the case turns upon the proper construction of the charter of the Illinois Central Railroad Company, granted by the General Assembly, February 10, 1851. As was said in the case of *Walsh* v. *Columbus, Hocking Valley & Athens Railroad Company, ante*, 469, and the prior cases therein cited, whenever a contract created by a state statute is alleged to have been impaired by subsequent legislation, it is for this court to determine the proper construction of such statute, as well as the question whether the subsequent legislation has impaired it.

The sections of the charter upon which the railroad company relies for taking possession of this property, so far as the same are pertinent to this case, are as follows:

"Sec. 3. The said corporation shall have right of way upon, and may appropriate to its sole use and control, for the purposes contemplated herein, land not exceeding two hundred feet in width through its entire length; *may enter upon and take possession of and use all and singular any lands, streams and material of every kind, for the location of depots and stopping stages*, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turnouts, engine houses, shops and other buildings necessary for the construction, completing, altering, maintaining, preserving and complete operation of said road. *All such lands, waters, materials and privileges belonging to the State are hereby granted to said corporation for said purposes;* but when owned or belonging to any person, company or corporation, and cannot be obtained by voluntary grant or release, the same may be taken and paid for, if any damages are awarded, in the manner provided in 'An act to provide for a general system of railroad incorporations,' approved November fifth,

one thousand eight hundred and forty-nine; and the final decision or award shall vest in the corporation hereby created all the rights, franchises and immunities in said act contemplated and provided; . . . *Provided*, that nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of said streams."

"Sec. 8. . . . Nothing in this act contained shall authorize said corporation to make a location of their track within any city, without the consent of the common council of said city."

"Sec. 10. Said corporation may construct their said road and branches over or across any stream of water, watercourse, road, highway, railroad or canal, which the route of its road shall intersect, but the corporation shall restore the stream or watercourse, road or highway, thus intersected, to its former state, or in a sufficient manner not to have impaired its usefulness. . . ."

"Sec. 15. . . . *Third.* — That said company shall proceed to locate, survey and lay out, construct and complete said road and branches, through the entire length thereof, . . . with a branch also diverging from the main track at a point not north of the parallel of thirty-nine and a half degrees north latitude, and running on the most eligible route into the city of Chicago, on Lake Michigan. That the central road or main track shall be completed, with at least one line of rails, or single track, with the necessary turnouts, stations, equipments and furnishings, within four years from the date of the execution of said deed of trust, and the branches within six years from the said date."

The position of the railroad company under these sections, presupposing as it does a vested, continuing and irrevocable right for all time, to use such of the shallow waters and submerged lands of Lake Michigan as it may now or hereafter find to be necessary to the proper and complete operation of its road, and a surrender by the city of all power of interference, is certainly a somewhat startling one. It is no matter of surprise that the magnitude of the claim should have at once aroused the authorities of the city to inquire into its soundness.

Under the law of the State of Illinois, as laid down by the Supreme Court, not only in the case under consideration, but in the prior case of *People* v. *Kirk*, 162 Illinois, 138, 146, "the State holds the title to the lands covered by the waters of Lake Michigan lying within its boundaries, but it holds the title in trust for the people, for the purposes of navigation and fishery. The State has no power to barter and sell the lands as the United States sells its public lands, but the State holds title in trust in its sovereign capacity, for the people of the entire State." Such was also the ruling of this court in a case between the same parties, *Illinois Central Railroad* v. *Illinois*, 146 U. S. 387, affirming *Illinois* v. *Illinois Central Railroad*, 33 Fed. Rep. 730. This, too, is a question of local law with regard to which the decisions of the state courts are conclusive. *Packer* v. *Bird*, 137 U. S. 661; *Hardin* v. *Jordan*, 140 U. S. 371.

But we are now asked to say that, not the State, but a railway company, is vested with a power which, in the course of time and in the increasing magnitude of its business, may enable it to do, by indirection or piecemeal, what it has been held the State could not do directly — take the whole water front of the city to the limit of navigation for the operation of the road, and that, too, without the consent and against the protest of the city. If such authority be possible, it should be granted in the clearest and most unmistakable language.

But on examining section three of the charter — the source of this almost unlimited power — we find that, so far from its being conferred in precise and definite words, the implication is clearly against the power claimed. In fact, it is only by a strained and unnatural construction that any intention on the part of the legislature to abdicate its authority over the submerged lands of Lake Michigan can be raised.

Referring to the particular language of the grant in that section, it is manifest that such authority must arise either from the right given "to enter upon and take possession of and use all and singular any *lands, streams* and materials of every kind," etc., or from the grant of "all *such lands, waters,* materials and privileges belonging to the State."

We do not question the general principle that the word "lands" includes everything which the land carries or which stands upon it, whether it be natural timber, artificial structures or water, and that an ordinary grant of land by metes and bounds carries all pools and ponds, non-navigable rivers and waters of every description by which such lands, or any portion of them, may be submerged, since, as was said by the court in *Regina* v. *Leeds & Liverpool Co.*, 7 Ad. & El. 671, 685: "Lands are not the less land for being covered with water." See also *Brocket* v. *Ohio &c. Railroad*, 14 Penn. St. 241; *Beckman* v. *Kreamer*, 43 Illinois, 447; *Hooker* v. *Cummings*, 20 Johns. 90; *State* v. *Pottmeyer*, 33 Indiana, 402; *Rex* v. *Wharton*, Cas. Temp. Holt, 499; *S. C.* 12 Mod. 510; *Buckingham* v. *Smith*, 10 Ohio, 288; *Mill River Woollen Mfg. Co.* v. *Smith*, 34 Connecticut, 462; *Waters* v. *Lilley*, 4 Pick. 199; *Washington Ice Co.* v. *Shortall*, 101 Illinois, 46.

But it is equally well settled that, in the absence of any local statute or usage, a grant of lands by the State does not pass title to submerged lands below high water mark; *Pollard* v. *Hagan*, 3 How. 212; *Goodtitle* v. *Kibbe*, 9 How. 471; *United States* v. *Pacheco*, 2 Wall. 587; *Weber* v. *Harbor Commissioners*, 18 Wall. 57; *Hardin* v. *Jordan*, 140 U. S. 371, 381; *Shively* v. *Bowlby*, 152 U. S. 1, 13; and that this principle also applies to the Great Lakes. *Illinois Central Railroad* v. *Illinois*, 146 U. S. 387; *Hardin* v. *Jordan*, 140 U. S. 371, 382; *Seaman* v. *Smith*, 24 Illinois, 521; *People* v. *Kirk*, 162 Illinois, 138, 146; *Revell* v. *The People*, 177 Illinois, 468, 479.

It is true, as was said by the court in *Shively* v. *Bowlby*, 152 U. S. 1, 13, that if either the language of the grant or long usage under it clearly indicates an intention that waters submerged by the sea shall be included, it is within the power of the sovereign to grant them. But we know of nothing in the way of constant usage with regard to these submerged waters which lends support to the argument of the railroad company that this case is within the exception and not within the general principle of *Shively* v. *Bowlby*. To make usage significant of the proper interpretation of the grant, it should

appear that it was a usage for the railroad company to appropriate such lands without the express consent of the city, but with its silent acquiescence. Undoubtedly such usage might be inferred from repeated appropriations by the railroad without objection from the city authorities. But the facts seem to be that, wherever the railroad has taken such lands, it has done so with the express consent or subsequent ratification of the State or city. Thus the railroad originally entered the city under an ordinance adopted June 14, 1852, giving it the right "to enter said city at or near the intersection of its southern boundary with Lake Michigan, and following the shore on or near the margin of said lake northerly to the southern bounds of the open space known as Lake Park, in front of canal section 15, and continue northerly across the open space in front of said section 15 to such grounds as the said company may acquire between the north line of Randolph street and the Chicago River, . . . upon which said ground shall be located the depot of said railroad," and express permission was given in section three of this ordinance to extend the railroad company's works and "fill out into the lake to a point on the southern pier not less than four hundred feet west from the present east end of the same."

In *Illinois Central Railroad* v. *Rucker*, 14 Illinois, 353, it was held that the company had the right *by its charter* to locate its road over these premises, *the city having consented to such location.* That was an application by the railroad company for the condemnation of certain lands along the water front. The petitioner alleged that the railroad had been located and was to be constructed in the waters of the lake, along the margin, in front of the premises of the land owners, and partly over the same. One of the defences was that the corporation had no power to locate its road in the waters of Lake Michigan, and that the premises in question were a part of the harbor of Chicago and an encroachment thereon. Counsel for the road took the position that the State had, by the express words of the charter, given to the company authority to locate its road in the waters of the lake. The opinion

is very brief, and the report of the case unsatisfactory, but the court did hold that the company had the right by its charter to locate the road over the premises in question, the city having assented. In the case under consideration the Supreme Court took the view that the controversy in that case concerned only the 200 feet strip for the location of the main track; that no question was raised or decided in regard to the right of the railroad company to go beyond the 200 feet right of way, and take submerged lands for an engine house or other purposes named in the charter. This is entirely true; at the same time it is difficult to see wherein authority to take this 200 feet strip is distinguishable from an authority to take such other submerged lands as are necessary for the complete operation of the road. It is highly probable that, if the case had been presented in the light of subsequent authorities, a different conclusion might have been reached. It is sufficient to say of the *Rucker case*, however, that the city was no party to the litigation, having expressly consented to the location of the main track, and that it is in no sense estopped by the adjudication. It was entirely competent for the Supreme Court in the instant case to take a different view of the law.

It would appear that, prior to 1869, other encroachments had been made upon these submerged lands, and upon April 16, 1869, the General Assembly by an act condoned these encroachments, and declared that the right of the company "under the grant from the State in its charter . . . and under and by virtue of its *appropriation, occupancy, use and control* . . . in and to the lands submerged," was confirmed, a procedure which seems to have been quite unnecessary upon the present theory of the railroad company that it has a perpetual right under its charter to take such submerged lands as were necessary for its complete operation. *McAuley* v. *Columbus, Chicago &c. Central Railway*, 83 Illinois, 352.

The position here taken, that the grant of the railroad company did not include the submerged lands along the lake shore, is not in conflict with the New York cases, which related

to submerged lands admittedly belonging to private parties. In the principal case, *In the Matter of New York &c. Railroad Companies*, 77 N. Y. 248, the proceeding was for the condemnation of lands in the city of New York, along the Hudson River, a large portion of which was under water. It was held that, so far as they belonged to private parties, they might be condemned, but so far as the lands formed a part of the streets and avenues of the city, the company could not acquire title to them, for the reason that they belonged to the city and were for the benefit of the public, citing *People* v. *Kerr*, 27 N. Y. 188. It was also held that, so far as respected the lands of private parties, the fact that they were submerged made no difference. In *Staten Island Rapid Transit Co.*, 103 N. Y. 251, it appeared that the statute authorizing the formation of railroad corporations empowered them to acquire lands, under the right of eminent domain, not only from individuals, but also from the State: but, as observed by the court in the opinion, all questions as to the right of a railroad company to acquire lands under navigable waters, as against the State, were excluded from the controversy. In the case of *Kerr* v. *West Shore Railroad*, 127 N. Y. 269, it was held that proceedings taken by the company to acquire a right of way across plaintiff's lands were effectual to vest in the company whatever title plaintiff had in the upland or in the land under the waters of the river, but it was said in the opinion to be familiar law that the shores of navigable rivers and streams, and the lands under the waters thereof, belong to the State, and may be appropriated by the State to all municipal purposes.

The grant of "waters" in the second sentence of section three is, as shown by the context, still less decisive of an intent on the part of the legislature to make a general grant of the waters of Lake Michigan. By the first sentence of this section power is given to the corporation to appropriate land not exceeding two hundred feet in width through its entire length, and "to enter upon and take possession of and use all and singular any lands, *streams* and materials of every kind for the location of depots and stopping places,

etc., . . . for the complete operation of said road;" and by the second sentence "all such lands, *waters*, materials and privileges, belonging to the State, are hereby granted to said corporation for the said purposes, . . . provided that nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of said *streams*." Obviously the words "such waters" in the second sentence is limited to the "streams" specified in the first sentence, and power was given to the railroad company to take possession of such streams for the purpose of constructing bridges, dams, embankments, excavations, station grounds, etc., upon the theory that the navigable streams of the State could not be bridged, diverted or encroached upon, except with the express authority of the State. The object of the section was evidently to confer such authority, subject, of course, to the navigation laws of the United States. *Escanaba Co.* v. *Chicago*, 107 U. S. 678, 683; *Illinois River &c. Packet Co.* v. *Peoria Bridge Asso.*, 38 Illinois, 467; *Chicago* v. *McGinn*, 51 Illinois, 266.

The word "streams" was evidently used to denote running waters, and is wholly inapplicable to a body of water like Lake Michigan. *Trustees of Schools* v. *Schroll*, 120 Illinois, 509. That this was the intention of the legislature is also evident from the proviso of the section "that nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of said streams." The use of this word "streams" was not only intended to differentiate the waters of rivers from the waters of the lake, but also has its bearing as tending to show that the word "land" was used in the sense of dry lands, or upland, as distinguished from submerged land. It is incredible that, if the General Assembly had intended to authorize the company to take possession of submerged lands, as it found it necessary or convenient so to do, it would not have employed more explicit language to that effect.

3. But even if the grant were as broad as claimed, and gave the company a right to take parcels of submerged land, as it became necessary for its railroad purposes, we are yet con-

strained to hold that it could not do so without the consent of the common council. The eighth section of the charter provides that "nothing in this act contained shall authorize said corporation to make a location of their track within any city, without the consent of the common council of said city." We see nothing in the act from which an intention can be inferred to confine this proviso to the main track of the road, and agree with the Supreme Court of Illinois that it included its depots, engine houses and the necessary track approaches to the same. Such seems to have been the practical construction placed upon it by the city and the railroad company. If the position of the company, that it applies only to the main track, were sound, it would be possible for it, upon establishing the necessity for additional facilities, to locate these engine houses and work shops in localities where they would be an intolerable nuisance to the inhabitants; or perhaps miles distant from the main line to which approaches would become necessary by tracks laid through populous portions of the city, regardless of the wishes of its constituted authorities.

It is also insisted by the company that this restriction applies only to the city as bounded in 1851, at the date of the charter, and that as the southern limit of the city at that time was Twenty-second street, no such consent is now necessary to be obtained, though the boundaries of the city have long since been extended to a point below the land proposed to be taken. Had the company signified a desire to take possession of these lands before the limits of the city had been extended, it is possible that it might claim a vested right to do so, though the boundaries were subsequently enlarged; but the object of the provision was evidently for the protection of cities in general, and not for the protection of cities as they existed at the date of the charter. The road, as originally constructed, ran through an almost uninhabited country, and yet a country which gave promise of a large population and of great cities being built up along the line of the road; and it is highly improbable that the growth of the State should not have been foreseen and contemplated in this legislation. Indeed, it is impossible to suppose that the legislature intended

that the road, so far as it passed through existing cities, all then insignificant, should be subject to the will of the common council, but so far as it passed through cities that might arise in the future, or existing cities whose boundaries would shortly be enlarged, it abdicated such power.

The case of *Regina* v. *Cottle*, 3 Eng. L. & E. 474, is pertinent in this connection. A turnpike act, passed in 1840, and which was to be in force for thirty-one years, provided that it should not be lawful to continue or erect any turnpike gate across the roads in the town of Taunton, or in any other town through or into which the roads might pass or be made. It was held that the prohibition extended to the erection of a gate within the limits of a town as it existed at any time during the operation of the act, and not merely at the time when the act passed. Said Lord Campbell: "We think the legislature contemplated the probable increase of Taunton within a period longer than that generally assigned for a generation of the human race, and intended that its inhabitants, as it increased, should be exempt from the annoyance of a turnpike gate cutting off the free intercourse between neighbors in the same street. . . . This construction is fortified by the reference 'to any other town through or into which the said roads may pass,' meant, probably, to protect the inhabitants of any new town which might spring up within the district while the act should be in force."

The case of *The People* v. *Deehan*, 153 N. Y. 528, is also apposite in this connection. In that case a grant by the town authorities to an incorporated gas company of a power to lay conductors "for conducting gas in and through the public streets and highways of said town," without any express limitation, was held not to be restricted to existing streets and highways, but to be construed as extending to such as were subsequently enlarged, changed or opened. In delivering the opinion the court observed: "When the right to use the streets has been once granted in general terms to a corporation engaged in supplying gas for public and private use, such grant necessarily contemplates that new streets are to be opened and old ones extended from time to time, and so the privilege may

be exercised in the new streets as well as in the old. Such a grant is generally in perpetuity, or during the existence of the corporation, or at least for a long period of time, and should be given effect according to its nature, purpose and duration."

There is nothing in these cases in conflict with those of *Chope* v. *Detroit & Howell Plank Road Co.*, 37 Michigan, 195, and *Detroit* v. *Detroit & Howell Plank Road Co.*, 43 Michigan, 140, in both of which it was held that a toll gate, lawfully erected upon land which was subsequently taken into the city, could not be declared a nuisance by reason of the extension of the boundaries, and that the same could not be abated without a violation of the Constitution.

In the case under consideration, however, no invasion of the right of property is contemplated. The subjection of the railroad company to the will of the common council deprived the company of nothing it before possessed, but limited the exercise of a right which had not yet become vested and was still subject to the police power. The question is really one of the intention of the General Assembly in incorporating this provision into the charter of the company, and in view of the need of some control of this kind and the condition of the country at the time the charter was adopted, we can have no doubt whatever that the assent of the common council was intended to be required as a permanent condition. Especially is this so in view of the insistence of the railroad company that the power to appropriate these submerged lands is a continuing one. In such case the condition upon which the power should be exercised, namely, the consent of the common council, should also be construed as continuous. In other words, the railroad company cannot assert the power and in the same breath repudiate the condition.

In conclusion, we are of opinion that the decree of the Supreme Court of Illinois was clearly right, and it is therefore

Affirmed.